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No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC. ASSIGNEE OF BERG MILL SUPPLY CO., INC.; CONSOLIDATED FIBRES, INC., PAPER FIBERS, INC., and SASSOON INTERNATIONAL CORPORATION,

Petitioners,

v.

AMERICAN MAIL LINE, LTD., PACIFIC WESTBOUND CONFERENCE, JAPAN LINE, LTD., KOREA MARINE TRANSPORT CO., LTD., MITSUI O.S.K. LINES, LTD., SEA-LAND SERVICE, INC., SHOWA LINE., LTD., et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED FOR REVIEW

A. Re: Applicability Of The Antitrust Laws To Monopolistic Rate-Fixing Actions That Violate An Approved Agreement Under Section 15 Of The Shipping Act.[1]

1. Is the partial exemption from the antitrust laws granted by Section 15 of the Shipping Act to respondent Pacific Westbound Conference restricted to concerted rate-fixing actions that are within the bounds of the Conference's approved charter agreement under Section 15, as this Court ruled in *Carnation Co.* v. *Pacific Westbound Conference et al.*, 383 U.S. 213 (1966)—or is that exemption to be extended by the Ninth Circuit's decision in this case to monopolistic, discriminatory rate-fixing actions that are plainly prohibited by, and thus beyond the scope of, the Conference's approved charter?

B. Re: Applicability Of The Antitrust Laws To A Monopolistic Rate-Fixing Combination Of Carriers And Shippers That Relies On Secret Rate-Fixing Agreements Never Approved Under Section 15 Of The Shipping Act.

2.(a) Does Section 15 of the Shipping Act extend immunity from the antitrust laws to a monopolistic, discriminatory rate-fixing combination of carriers and shippers that constantly restrains wastepaper exports from the West Coast to the Far East by utilizing, as its most effective anticompetitive weapon, secret, preferential rate-fixing agreements, none of which are

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[1] Section 15 of the Shipping Act, 46 U.S.C. § 814.

The questions presented for review arise out of the following circumstances: After a lengthy investigation under the Shipping Act, a Federal Maritime Commission Administrative Law Judge (ALJ) ruled that respondents' monopolistic, discriminatory rate-fixing practices in this case (1) violate Article 2 of the Conference's approved charter under § 15 of the Shipping Act; (2) violate rate-fixing prohibitions contained in the Shipping Act itself; and (3) are detrimental to U.S. commerce and contrary to the public interest (App. 40a-41a). The ALJ thus found that respondents "misused" the Conference's approved charter agreement, and "operated beyond the

subject to regulation under the Shipping Act, and thus have never been filed or approved under Section 15?

(b) Should this Court decide this important federal question because the Ninth Circuit's vague ruling on this issue conflicts with this Court's decisions in *Carnation, supra; Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 728 (1973) ("[I]f . . . contracts are not approved by the Commission, the antitrust laws are fully applicable to them"); and *Group Life & Health Ins.* v. *Royal Drug Co.*, 440 U.S. 205, 231 (1979) ("an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties")?

(c) Further, should this Court decide this question because the Ninth Circuit's ruling on this issue also clashes with the District of Columbia Circuit's decision in *Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 404 F.2d 804, 818 (D.C. Cir. 1968), *cert. denied* 393 U.S. 1093 (1969) ("[T]he antitrust laws continue in effect . . . as to areas not subject to the Shipping Act—e.g. a restraint engineered by one or more ocean tramps affecting American foreign commerce")?

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scope of the Commission's grant of partial immunity from the antitrust laws" (App. 40a-41a).

Upon review of the Commission's subsequent arbitrary rejection of the ALJ's rulings, the District of Columbia Circuit reversed the Commission and substantially affirmed the ALJ's findings. *National Assn. of Recycling Industries, Inc.* v. *Federal Maritime Commission*, 658 F.2d 816, 823, 829 (1980).

The Ninth Circuit has now summarily dismissed petitioners' ensuing antitrust action against the Conference and its members, holding that the antitrust immunity they enjoy under Section 15 of the Shipping Act is so broad and so enduring that it even encompasses monopolistic, discriminatory rate-fixing that has been found to be flatly prohibited by *both* the Shipping Act itself and the Conference's approved charter under Section 15 (App., 1a-8a).

C. Re: Applicability Of The Antitrust Laws To Monopolistic Rate-Fixing Found, After Investigation Under The Shipping Act And Judicial Review, To Violate Rate-Fixing Prohibitions Contained In The Shipping Act, To Be Detrimental To U.S. Commerce And Contrary To The Public Interest.

3.(a) Did the Ninth Circuit err by ruling that respondents' monopolistic, discriminatory rate-fixing actions in this case—which were found to be violative of rate-fixing prohibitions contained in Section 18(b)(5) of the Shipping Act[2], detrimental to U.S. commerce and contrary to the public interest in *National Association of Recycling Industries, Inc.* v. *Federal Maritime Commission et al.*, 658 F.2d 816 (1980)—are nevertheless still exempt from the antitrust laws under Section 15 of the Shipping Act?

Stated differently: Do even exempt monopolists become subject to antitrust restraints when they extend or exploit their lawful monopoly in an illegal manner prohibited by the very federal statute upon which their exemption is based?

(b) Should this Court resolve this important federal question because the Ninth Circuit's decision concedes on its face that it is in irreconcilable conflict with the decision from the Second Circuit in *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 285 F.Supp. 949 (S.D.N.Y. 1968), *cert. denied* 407 F2d 173 (2d Cir. 1969), *cert. denied* 394 U.S. 922 (1969)—and that its decision is also at odds with the District of Columbia Circuit's recent decision in *United States* v. *Bessemer & Lake Erie Railroad Company*, 717 F.2d 593, 599-600 (1983)?[3]

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[2] Shipping Act of 1916, as amended, 46 U.S.C. 817(b)(5).

[3] And, in addition, because the Ninth Circuit's decision is also in conflict with the decision in *Ocean Shipping Antitrust Litigation*, 500 F.Supp. 1235 (S.D.N.Y. 1980).

D. Re: Applicability Of The Antitrust Laws To Monopolistic Discriminatory Rates Privately Fixed Without Participation, Supervision Or Advance Approval Of Any Government Agency.

4.(a) Do the antitrust laws apply to illegal, monopolistic, discriminatory ocean freight rates, *privately fixed* by the Pacific Westbound Conference and its members and imposed on shippers, without any participation, supervision or advance approval of the Federal Maritime Commission or any other government agency?

(b) Should this question be settled by this Court since the Ninth Circuit's decision on this issue conflicts with this Court's decisions in *State of Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 458-460 (1945), *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 372-375 (1973), *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 592-600 (1976), *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105-106 (1980) and *Nat. Gerimedical Hospital & Gerontology* v. *Blue Cross*, 452 U.S. 378 (1981)?

E. Re: Availability Of Antitrust Relief Where Relief Is Allegedly Also Available Under The Shipping Act.

5. Did the Ninth Circuit also err by suggesting—contrary to this Court's decisions in *Carnation Co.* v. *Pacific Westbound Conference*, *supra* at 383 U.S. 224, and *State of Georgia* v. *Pennsylvania R. Co.*, *supra*, at 324 U.S. 459, 460—that petitioners are foreclosed from relief under the antitrust laws because allegedly "private remedies do exist under the Shipping Act"?

F. Re: Applicability Of The *Per Se* Antitrust Liability Doctrine To This Case Absent Immunity From The Antitrust Laws.

6. If the concerted, monopolistic rate-fixing activities of the Pacific Westbound Conference and its members in this case are not cloaked with antitrust immunity under the Shipping Act, are they *per se* unlawful under the Sherman Act and this

Court's decisions in *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290, 341-42 (1897), *United States* v. *Joint Traffic Association*, 171 U.S. 505 (1898), *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940), *International Salt Co.* v. *United States*, 332 U.S. 392, 396 (1947), *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958), *Catalano* v. *Target Sales, Inc.*, 446 U.S. 643, 647 (1980), and *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332 (1982)?

G. Re: The Ninth Circuit's Summary Dismissal Of The Complaint.

7.(a) Did the Ninth Circuit err, as it did in Carnation (383 U.S. 222) and contrary to *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957), by summarily dismissing the complaint for failure to state a claim without affording petitioners an opportunity to prove or further develop the facts alleged in the complaint?

(b) Did the Ninth Circuit err by failing even to discuss the facts alleged in the complaint and by apparently failing to "look at the economic reality of the relevant transactions," as this Court directed in *United States* v. *Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 208, 209?

(c) Did the Ninth Circuit, contrary to this Court's decision in *Continental Ore Co.* v. *Union Carbide & Carbon Co.*, 370 U.S. 690, 698-99 (1962), err by adjudging the combination in restraint of trade alleged in the complaint on a piecemeal basis, and not as a continuing, undivided rate-fixing combination of carriers and shippers?

LIST OF PARTIES

The following parties were before the United States Court of Appeals for the Ninth Circuit in this case:

Petitioners

1. National Association of Recycling Industries, Inc., New York, N.Y., the trade association for the nation's metals, paper, textile and rubber recycling industries.

2. Berg Mill Supply Co., Inc., Beverly Hills, California.

3. Consolidated Fibres, Inc., San Francisco, California.

4. Paper Fibers, Inc., Los Angeles, California.

5. Sassoon International Corporation, formerly M. Sassoon & Co., Inc., Los Angeles and Oakland, California.

6. A class consisting of firms similarly situated to Berg Mill Supply Co., Inc., Consolidated Fibres, Inc., Paper Fibers, Inc. and Sassoon International Corporation which, during the period of time covered by the complaint, exported or shipped recyclable or recycled wastepaper by water in foreign commerce from the West Coast of the United States and Canada to customers or markets in the Far East aboard vessels operated by respondent carriers at rates fixed by respondent carriers in combination through appellee Pacific Westbound Conference.

Respondents

7. Pacific Westbound Conference, San Francisco, California.

8. American Mail Line, Ltd., Seattle, Washington.

9. American President Lines, Inc., Oakland, California.

10. Barber Blue Sea Line, a/k/a Barber Lines, A/S. Oslo, Norway.

11. The East Asiatic Co., Ltd., a/k/a "EAC-Knutsen Line", Copenhagen, Denmark.

12. Galleon Shipping Corporation, Manila, Philippines.

13. Global Bulk Transport, Incorporated, Isthmian Lines, Inc. and States Marine International Corp., a/k/a "States Marine Lines", New York, New York.

14. Japan Line, Ltd., Tokyo, Japan.

15. Kawasaki Kisen Kaisha, Ltd., Kobe, Japan.

16. Korea Marine Transport Co., Ltd., Seoul, Korea.

17. A.P. Moller-Maersk Line, a consortium consisting of Dampskibsselskabet AF 1912 Aktieselskab and Aktieselskabet Dampskibsselskabet Svenborg, Copenhagen, Denmark.

18. Maritime Company of the Philippines, Manila, Philippines.

19. Mitsui O.S.K. Lines, Ltd., Tokyo, Japan.

20. Nippon Yusen Kaisha, Tokyo, Japan.

21. Orient Overseas Container Line, Inc., a/k/a "OOCL-Seapac Service", Hong Kong.

22. Pacific Far East Line, Inc., San Francisco, California.

23. Peninsular and Steam Navigation Company, London, England.

24. Phoenix Container Lines, Ltd., Hong Kong.

25. The Scindia Steam Navigation Co., Ltd., Bombay, India.

26. Sea-Land Service, Inc., Edison, New Jersey.

27. Seatrain Lines, Inc. and Seatrain International, S.A., New York, New York and Oakland, California.

28. Shipping Corporation of India, Ltd., Bombay, India.

29. Showa Line, Ltd., formerly Showa Shipping Co., Inc., Tokyo, Japan.

30. States Steamship Company, a/k/a "States Line", San Francisco, California.

31. Transportation Maritima Mexicana, S.A., Mexico.

32. United Philippine Line, Manila, Philippines.

33. United States Lines, Inc., New York, New York.

34. Yamashita-Shinnihon Steamship Co., Inc., a/k/a "Y.S. Line", Tokyo, Japan.

35. Waterman Steamship Corporation, New York, New York.

36. Zim Israel Navigation Co., Ltd., a/k/a "Zim Container Service", Haifa, Israel.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in this case is printed in the Appendix hereto, at pages 1a-8a. The earlier decision of the United States District Court for the Central District of California is printed in the Appendix, at pages 9a-21a. The decision of the United States Court of Appeals for the District of Columbia Circuit in the closely related case under the Shipping Act, *National Association of Recycling Industries, Inc. et al.* v. *Federal Maritime Commission et al.*, is officially reported at 658 F.2d 816 (1980).

JURISDICTION

The judgment of the Ninth Circuit in this case was entered on November 14, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutory provisions involved in this case are Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2; Section 4 of the Clayton Antitrust Act, 15 U.S.C. § 15; and Sections 15 and 18(b)(5) of the Shipping Act of 1916, as amended, 46 U.S.C. §§ 814, 817(b)(5). The relevant portions of those statutes are printed in the Appendix hereto, at pages 76a through 80a.

STATEMENT OF THE CASE

A. Introduction

This case under the Sherman and Clayton Antitrust Acts presents issues of critical importance to the nation's maritime and recycling industries, and to American exporters whose ability to export is necessarily dependent on monopolistic ocean rate-fixing conferences controlled by foreign shipping cartels.

The Ninth Circuit's *unprecedented* decision in this case clashes head-on with this Court's decision in *Carnation Co.* v. *Pacific Westbound Conference et al.*, 383 U.S. 213 (1966), and with many other landmark antitrust decisions rendered by this Court and other courts in the federal system. The Ninth Circuit's rulings extend broad, practically unlimited antitrust immunity under Section 15 of the Shipping Act, 46 U.S.C. § 814, to monopolistic, discriminatory rate-fixing activities of the Pacific Westbound Conference and its members which, after lengthy investigation and judicial review under the Shipping Act in *National Association of Recycling Industries, Inc.* v. *Federal Maritime Commission et al.*, 658 F.2d 816 (1980), were found to—

(1) violate basic rate-fixing prohibitions contained in the Conference's own approved rate-fixing charter under Section

15 of the Shipping Act—a charter whose provisions, as approved by the Federal Maritime Commission under the statute, define and limit the scope of the *partial* antitrust exemption enjoyed by the Conference and its members under the Shipping Act;

(2) violate statutory rate-fixing prohibitions contained in the Shipping Act itself—prohibitions enacted by Congress to restrict the partial antitrust exemption granted to any carrier or conference of carriers under Section 15 of the Act; and

(3) thrive on a series of secret, discriminatory, preferential rate-fixing agreements made by the "Big Six" Japanese carrier members of the Pacific Westbound Conference with some of petitioners' most powerful competitors—the Japanese cartels that export vast quantities of competing virgin wood chips from the Pacific Coast to the Far East—none of which agreements were ever filed or approved under Section 15 of the Shipping Act, and which thus are not entitled to any antitrust immunity under Section 15.

In reality, therefore, the Ninth Circuit's decision threatens to return this nation's shippers and exporters to the dark days *prior* to *Carnation*, *supra*, when courts in the Ninth Circuit erroneously approved the Pacific Westbound Conference's original straightforward claim that "the Shipping Act, 1916 repealed all antitrust regulation of the rate-making activities of the shipping industry" (383 U.S. 216).

B. The Basic Facts

Petitioners and the class of U.S. shippers and exporters they represent in this action are relatively small Pacific Coast firms engaged in the business of shipping recyclable wastepaper, collected and processed in the United States, from ports along the West Coast to paper manufacturers in Japan, Korea, Taiwan and other countries of the Far East (App. 24a, 25a).[1]

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[1] References to "App" are to the Appendix to this petition. References to "CR" are to the record in the courts below.

These U.S. wastepaper shippers necessarily compete in the Far East with both (i) wastepaper shippers from other nations and (ii) large U.S. forest products companies and Japanese cartels that ship virgin wood chips and/or processed virgin woodpulp from the Pacific Coast to paper manufacturers in the Far East (App. 32a-33a). It has been *judicially* established, of course, that "wastepaper competes with woodpulp and wood chips" in the Far East, and that these commodities are the basic raw materials required for paper manufacturing both here in the United States and in the Orient.[2]

The complaint alleges the obvious: A cheap, abundant supply of recyclable wastepaper is constantly available in the United States for shipment to the Far East—and several important public interests dictate that it be recycled and reused, not burned or buried as solid waste (App. 33a).[3] In the Far East, in turn, there is a huge, growing demand for paper manufacturing raw materials, all three of which are interchangeable for paper manufacturing purposes (App. 32a).[4] Since wastepaper prices on the Pacific Coast are low, that wastepaper is very attractive to buyers in the Far East. In the final analysis, therefore, the *cost of ocean transportation* determines whether wastepaper is saleable, and in what volumes (App. 33a).[5]

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[2] See *National Association of Recycling Industries, Inc.* v. *Federal Maritime Commission*, 658 F.2d 816, 818, 820-22, 827-28 (D.C. Cir. 1980).

[3] See *National Association of Recycling Industries, Inc.* v. *Interstate Commerce Commission*, 585 F.2d 522, 531, n.45, 46 (1978), *cert. denied*, 440 U.S. 929 (1979); *Nat. Assn. of Recycl. Ind.* v. *F.M.C.*, *supra*, at 658 F.2d 827-829 (1980). See also *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 99 S.Ct. 2531 (1978), including the factual discussion in the dissenting opinion.

[4] *See* 658 F.2d 819-822.

[5] *Id.*, at 658 F.2d 822-823.

The record in this case demonstrates that the *cost of ocean transportation* for competing shipments of recyclable wastepaper, virgin woodpulp and virgin wood chips in the Pacific westbound trade has consistently been fixed by the carrier members of the Pacific Westbound Conference by means of (i) rate-fixing actions taken in concert or combination by the carriers through the Conference, and (ii) rate-fixing actions taken by carrier members of the Conference in concert or combination with petitioners' principal competitors, large shippers of competing virgin woodpulp and/or wood chips in the Pacific westbound trade (App. 33a-36a).[6]

In this regard, it is established in this case that the Pacific Westbound Conference is a "monopolistic rate-making association."[7] It is controlled 4 to 1 by foreign flag shipping cartels, and its membership consists of such international ocean transportation giants as the "Bix Six" Japanese carriers (Japan Line, Mitsui, Showa et al); European shipping consortiums such as Barber Blue Sea Line and The East Asiatic Company; the large Hong Kong containership companies; the largest U.S. flag operators (Sea-Land, United States Lines etc.); the Israeli shipping company, Zim Israel; and others from Korea, India and the Philippines (App. 26a-30a). During the period covered by the complaint, the Pacific Westbound Conference and its members enjoyed almost total, absolute monopoly control over wastepaper shipments from the West Coast to the Far East.[8] On the average, Conference members carried almost 95% of the wastepaper exports;[9] in some years, they actually monopolized 99% of the available wastepaper traffic to the Far East (App. 59a).[10] This monopoly is nurtured by the Conference's "*dual rate system*," which compels wastepaper shippers who

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[6] *Id.*, at 658 F.2d 819-824.

[7] *Id.*, at 658 F.2d 818.

[8] *Id.*, at 658 F.2d 823.

[9] *Id.*

[10] *Id.*

refuse to agree to ship *exclusively* aboard Conference vessels to pay penalties that add 15% to the Conference's wastepaper rates that are already extraordinarily unreasonable and extremely discriminatory (App. 59a).[11]

The Conference and its members, however, have not achieved that same degree of monopolistic control over the wastepaper shippers' principal competitors—the large integrated forest products companies (Weyerhaeuser, Georgia-Pacific, Crown-Zellerbach etc.) that ship competing virgin woodpulp and/or wood chips, and the Japanese cartel trading companies that purchase and ship wood chips from the Pacific Coast to Japan and Korea each year (App. 57-59a).[12] Woodpulp movements are subject to some competition from non-Conference carriers, while rates for wood chip shipments are fixed by members of the Pacific Westbound Conference in combination, and through secret rate-fixing agreements, with the wood chip shippers, principally the Japanese cartels.[13]

Over the years since the late 1960's, therefore, the Conference and its members have actually utilized their monopolistic domination of U.S. wastepaper shippers to make them help *subsidize*, through the payment of "*outrageously high*" rates, the *extremely low, preferential* rates the Conference and its members continuously grant competing woodpulp and wood chip shippers for ocean transportation to the same markets in the Far East.[14] This debilitating restraint of trade in recyclable wastepaper has been accomplished by respondents in the following manner:

1. Their wastepaper rates are rigidly fixed and enforced at extraordinarily high levels through combined, concerted rate-

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[11] *Id.*

[12] See *Id.*, at 658 F.2d 820. See also *Confidential Ex. 99* on file with the Clerk of this Court.

[13] *Id.*, at 658 F.2d 820; *Confidential Ex. 99.*

[14] *Id.*, at 658 F.2d 822-823.

fixing actions of the Pacific Westbound Conference (App. 34a).[15] Each and every carrier member of the Conference is contractually obliged to charge those fixed rates, albeit the rates have periodically exceeded the Pacific Coast F.O.B. value of the wastepaper by as much as *268%* to *309%* (App. 55a, 69a-70a). Since Conference members have enjoyed almost total monopoly control over all wastepaper shipments, wastepaper shippers either paid the exorbitant rates or forfeited their markets in the Far East.

The Conference has also discouraged non-Conference carrier competition for wastepaper shipments to the Far East by fixing, whenever necessary, extremely discriminatory rates among competing wastepaper shippers (App. 37a). For example, to discourage non-Conference competition for shipments to Taiwan, the Conference recently fixed a containerized wastepaper rate of $39.00 per ton, while its fixed rate for identical containerized wastepaper shipments to Japan was $65.00 a ton, albeit trips to Taiwan are 1,500 miles longer—and thus more costly for carriers—than trips to Japan (App. 68a).

2. Respondents' woodpulp rates, on the other hand, have been kept "*open*" by the Conference—i.e. fixed, not by concerted action of the Conference members, but by individual carrier members of the Conference in *combination with the woodpulp shippers*, at whatever levels that traffic would agree to pay to ship aboard Conference members' vessels.[16] Those rates were therefore regularly about *100% lower* than the Conference's fixed wastepaper rates—and unlike those oppressive rates, they amounted to only *16%* to *29%* of the woodpulp exports' Pacific Coast F.O.B. valuations (App. 55a).[17]

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[15] *Id.*, at 658 F.2d 818.

[16] *Id.*, at 658 F.2d 818.

[17] *Id.*, at 658 F.2d 818, 822.

The Commission investigation disclosed that *no* relevant transportation characteristics—such as volume of shipments, dependability of traffic, commodity valuations etc.—justified these "outrageous" rate differentials for *identical containerized cargoes* of competing wastepaper and woodpulp to the same markets in the Far East. Indeed, the transportation characteristics of wastepaper are more favorable for the carriers, and thus wastepaper, not woodpulp, actually merits a lower rate (CR 30, p. 68-84; 104).[18]

3. Finally, wood chip rates are fixed by respondent "Big Six" Japanese carrier members of the Conference in *combination with the wastepaper shippers' other competitors, the wood chip shippers*. The Japanese carriers operate *outside the Conference* to make secret, long-term rate-fixing agreements with these shippers--typically Japanese cartels closely related by corporate affiliation to Japanese carrier members of the Pacific Westbound Conference (App. 36a, 58a; Confidential Exhibit 99).[19] None of these secret rate-fixing agreements are subject to regulation under the Shipping Act, hence none are filed or approved under Section 15.[20]

Evidence produced by one of the Japanese carriers, respondent Japan Line, established that these secret, unapproved rate-fixing agreements provided petitioners' competitors—the Japanese cartel wood chip shippers—with rates for 10 years that are as much as *400% lower* than the monopolistic rates fixed in concert by the Japanese carriers and other members of the Conference for competing wastepaper shipments to the same markets in Japan and Korea.[21] This type of predatory rate-fixing behavior was not isolated or inadvertent: "All of

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[18] *Id.*, at 658 F.2d 822.

[19] See *Confidential Exhibit 99, supra*.

[20] See 658 F.2d 820.

[21] For example, compare the wastepaper rates contained in the Maritime Commission's chart at App. 55a with *Confidential Ex. 99* on file with the Court.

PWC's Japanese member lines" made "private non-Conference contractual arrangements" with petitioners' competitors, the wood chip shippers, while they simultaneously participated as Conference members in the constant imposition of monopolistic, discriminatory rates on competing wastepaper shipments. (App. 58a).[22]

The economic consequences suffered by U.S. wastepaper shippers have been devastating. They have consistently been forced to pay *four times* as much as competing wood chip shippers, and more than *twice* as much as competing woodpulp shippers, to transport *identical tonnages* of the competing materials to the *same markets* in the Far East (App. 55a; *Confidential Ex. 99*). The Far East market for wood chips, which was not even established until 1965, grew so steadily and spectacularly that soon more than 4,000,000 tons a year were shipped from the Pacific Coast to Japan and Korea alone (App. 58a). U.S. wastepaper exporters, on the other hand, realized "proportionately little of the market's potential."[23] "Whereas the Far East demand for recyclables is vast, only *two percent* of Japan's wastepaper requirements are filled by exports from the United States."[24]

Consequently, it has been established in this case that respondents' monpolistic, discriminatory, preferential rate-fixing practices have constantly restrained trade in recyclable wastepaper, and resulted in the loss of markets, sales and profits for petitioners and the American wastepaper shippers they represent herein (App. 60a-64a).

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[22] Compare *Confidential Ex. 99, supra*, with list of Conference member respondents in this case, and see App. 58a.

[23] See 658 F.2d 823.

[24] *Id.*

C. The Related Case Under The Shipping Act

On July 20, 1972, the Federal Maritime Commission issued an order of investigation under the Shipping Act which charged that respondents' aforesaid rate-fixing activities violate Sections 15, 16 First, 17 and 18(b)(5) of the Act (App. 53a, 54a). The Commission asserted that respondents' actions were contrary to the public interest, detrimental to U.S. commerce, unreasonable and unjustly discriminatory as between competing shippers (App. 53a, 54a).[25]

Hearings before an Administrative Law Judge (ALJ) dragged on for years. Finally, on August 15, 1977—more than five years later—the ALJ rendered a decision in which he ruled that the Conference's wastepaper rates were "exorbitant," "outrageously high," and violative of Sections 15 and 18(b)(5) of the Shipping Act (App. 63a-65a). With direct pertinence to the issues now before this Court, the ALJ ruled (CR 30, p. 127; 658 F.2d 823):

> "First, in fixing wastepaper rates so unreasonably high as to be a detriment to commerce, PWC misused its conference agreement to contravene the regulatory purpose of Section 18(b)(5). In employing its agreement so injuriously, PWC operated beyond the scope of the Commission's grant of partial immunity from the antitrust laws. The abusive use of the agreement operated to the detriment of the commerce of the United States and contrary to the public interest. . . .
>
> "Second, PWC's rate making practices were unjustly unfair as between wastepaper and woodpulp shippers . . . in violation of an express provision of Section 15 and in disregard of the specific terms of Article 2 of [PWC] Agreement No. 57. These illegalities also operated to the detriment of the commerce of the United States and contrary to the public interest. . . ."

On March 9, 1979, another eighteen months later, the Federal Maritime Commission—an agency criticized by the courts

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[25] FMC Docket No. 72-35, Pacific Westbound Conference—Wastepaper and Woodpulp From United States to Far East.

and Congress for its maladministration of the Shipping Act in cases involving monopolistic, anticompetitive activities[26]—arbitrarily reversed the ALJ on all grounds and rejected an Environmental Impact Statement prepared by its own Office of Environmental Analysis (CR 30, p. 132 et seq).

On December 24, 1980, almost another two years later, the D.C. Circuit vacated the Commission's decision, reinstated the Environmental Impact Statement, substantially affirmed the ALJ's rulings, and found respondents' rate-fixing actions violative of Section 18(b)(5) of the Shipping Act, 46 U.S.C. § 817(b)(5), detrimental to U.S. commerce, and contrary to the public interest.[27] The D.C. Circuit described the Federal Maritime Commission's performance in this case as follows, at 658 F.2d 818:

> "The Commission's laxity challenges the very character of the [Shipping] Act which, on one hand, grants considerable license to carriers, and on the other, obligates the Commission to ensure that the license does not work to the disadvantage of the national commerce."

The D.C. Circuit thus warned that, while the court would not attempt to "define the boundaries of the antitrust liability of carriers" under the Shipping Act in that case, the entire

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[26] See *United States Lines, Inc.* v. *Federal Maritime Commission*, 584 F.2d 519 (D.C. Cir. 1978); *Sabre Shipping Corp.* v. *American President Lines et al.*, 285 F.Supp. 949, 955-958 (S.D.N.Y. 1968), *cert. denied sub nom. Japan Line, Ltd.* v. *Sabre Shipping Corp;* 407 F.2d 173 (2d Cir. 1969), *cert. denied*, 395 U.S. 922 (1969); *Interpool, Ltd.* v. *Federal Maritime Commission*, 663 F.2d 142, 148-151 (D.C. Cir. 1980). In a 1982 House Judiciary Committee report on "*International Ocean Commerce Transportation*", H. Rept. 97-611, Part 2, pgs. 19, 43, 46, the Commission is variously described as "an inept regulatory agency", as "traditionally wedded to the cartels it regulates", and as a Commission which has "regulated with varying degrees of alacrity".

[27] *National Association of Recycling Ind.* v. *F.M.C.*, at 658 F.2d 825, 829.

"*rationale*" for antitrust immunity under Section 15 would surely "*cease*" if the Commission continues to fail to provide effective regulatory control over respondents' illegal, monopolistic, discriminatory rate-fixing actions.[2]

The Commission, however, completely ignored the D.C. Circuit's rulings. For more than a year after the court's decision was rendered, the Commission took no regulatory action of any kind. On January 11, 1982, the Commission finally issued a notice stating that, in its opinion, "no further administrative proceedings are necessary in this case" (App. 47a; CR 24, p. 108). Subsequently, the Commission asserted simply that it had no authority, in response to the D.C. Circuit's decision, to compel respondents to pay reparations for any of their past rate-fixing violations of Section 18(b)(5) of the Act, or to establish any new, lawful rates for wastepaper shippers (CR 34, p. 5).

D. Proceedings in The Ninth Circuit

In 1982, petitioners—still confronted with essentially the same monopolistic, discriminatory rate-fixing restraints of trade after a decade of proceedings under the Shipping Act, and with no effective relief in sight under that statute (App. 41a)—filed their complaint under the Sherman and Clayton Antitrust Acts (App. 23a-51a). The complaint was summarily dismissed by *unprecedented* decisions in the Ninth Circuit which held that, merely because the Pacific Westbound Conference holds an approved charter under Section 15 of the Shipping Act, all of respondents' monopolistic, discriminatory rate-fixing actions in this case are exempt from the antitrust laws, albeit said actions (1) violate rate-fixing prohibitions contained in the Conference's approved charter itself; (2) violate rate-fixing prohibitions contained in the Shipping Act; and (3) rely, in major part, on secret, unapproved rate-fixing agreements between Conference members and petitioners'

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[2] See *Nat. Assn. of Recycling Ind.* v. *F.M.C.*, at 658 F.2d 826.

competitors, non-exempt shippers, that are plainly not eligible for antitrust immunity under Section 15 (App. 1a-21a).

REASONS FOR GRANTING THE WRIT

I

The Ninth Circuit's Decision Irreconcilably Conflicts With This Court's Decision In *Carnation Co.* v. *Pacific Westbound Conference* And The Fifth Circuit's Related Decision In *Pacific Westbound Conference* v. *Federal Maritime Commission* In That It Grants Antitrust Immunity To Unapproved, Monopolistic, Discriminatory Rate-Fixing Activities Of The Conference That Violate—And Thus Operate Beyond The Scope Of—The Conference's Approved Charter Under Section 15 Of The Shipping Act

The Ninth Circuit's decision in this case is manifestly erroneous, and it clashes head-on with the combined decisions of this Court and the Fifth Circuit in *Carnation Co.* v. *Pacific Westbound Conference et al*, 383 U.S. 213, 86 S.Ct. 781 (1966), and *Pacific Westbound Conference* v. *Federal Maritime Commission*, 440 F.2d 1303, 1309-10 (1971), *cert. denied* 404 U.S. 881, 92 S.Ct. 202 (1971).

As indicated above, the Ninth Circuit's decision grants a sweeping exemption from the antitrust laws to respondents' concerted, grossly discriminatory rate-fixing activities and restraints of trade in this case *solely* because respondent Pacific Westbound Conference holds a *facially-benign* organizational charter that was approved six decades ago under Section 15 of the Shipping Act, 46 U.S.C. § 814.[29] But, the record in this case establishes—and the Ninth Circuit's decision necessarily

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[29] § 15 of the Shipping Act extends antitrust immunity exclusively to "agreements, understandings, conferences, and other arrangements" that are "lawful under this section"—i.e. that are approved in advance by the Commission. *Unapproved* rate-fixing arrangements are "*unlawful*", and *non-exempt*. Section 15 prohibits the Commission from approving—or continuing its prior approval—of rate-fixing understandings or conference rate-fixing activities found to be un-

concedes—that the *unfair, unreasonable, discriminatory* rate-fixing actions the Pacific Westbound Conference and its members have wilfully and continuously imposed in concert on petitioners in recent years *plainly violate essential rate-fixing prohibitions which have always been at the forefront of the Conference's said approved charter under Section 15* (App. 6a, 7a). Clearly, that type of *destructive, anticompetitive* rate-fixing was neither *contemplated* nor *licensed* when the Maritime Commission's predecessor agency approved the Conference's charter under Section 15 in 1923. *Ergo*, said charter, as approved under the Shipping Act, cannot, and does not, legally immunize that type of *discriminatory, anticompetitive* rate-fixing from the antitrust laws.

More specifically, the record demonstrates that when the giant international ocean carrier organizers of the Pacific Westbound Conference presented their charter to the Commission's predecessor agency in 1923 for approval under Section 15 of the Shipping Act—and thus asked for permission to engage in concerted, monopolistic rate-fixing activities—they assured the Government that their *sole* purpose was "to promote commerce . . . for the common good of shippers and carriers" (App. 69a). Consequently, in order to gain federal approval of their charter, respondents solemnly committed themselves as follows, at Article 2 (App. 70a): "There shall be no undue preference nor unreasonable discrimination nor unfair practice against any consignor or consignee by any of the parties hereto."

In *Carnation Co.* v. *Pacific Westbound Conference*, *supra*, the Conference contended that Section 15 of the Shipping Act—under which its charter was approved—"repealed all

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justly discriminatory or unfair as between shippers, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of any section of the Shipping Act (See 46 U.S.C. § 814).

antitrust regulation of [its] ratemaking activities" (383 U.S. 216). The Ninth Circuit, as it has done here, approved that contention, but this Court reversed, holding that the Conference and its members have only *"a limited antitrust exemption"* (383 U.S. 219). This Court ruled, at 383 U.S. 216, 217:

> "The Shipping Act contains an explicit provision exempting activities which are lawful under § 15 of the Act from the Sherman and Clayton Acts. This express provision covers approved agreements, which are lawful under § 15, but does *not* apply to the implementation of unapproved agreements, which is specifically prohibited by § 15. The creation of an antitrust exemption for ratemaking activities which are lawful under the Shipping Act implies that unlawful rate-making activities are *not* exempt."

After this Court's decision in *Carnation*, the litigation in that case moved to the Fifth Circuit in *Pacific Westbound Conference* v. *Federal Maritime Commission*, *supra*. There, it was ruled that the Pacific Westbound Conference's approved charter under Section 15, which is essentially the same charter now involved in this case, exempts only *routine ratemaking* activities from the antitrust laws; *rate-fixing activities "not contemplated by the plain language" of said charter are non-exempt, unless and until they are specifically and separately approved by the Commission under Section 15* (See 440 F.2d 1303, 1309).[20] The Fifth Circuit emphasized that rate-fixing arrangements which *"unlawfully affect"* the Conference's organic charter, or which are *not "incidental"* to the charter as

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[20] § 15 of the Shipping Act defines the term *"agreement"* to include *"understandings, conferences,* and *other arrangements"*. Under the Pacific Westbound Conference's charter, all rate-fixing actions are taken by secret "agreement" of two-thirds of the Conference's membership (App. 71a; 73a-74a). Thus, rate-fixing actions are "agreements", either within or outside the scope of the Conference's charter. Those that *violate* the Conference's approved charter are patently *unapproved, non-exempt agreements* under § 15 (See *Pacific Westbound Conference* v. *Federal Maritime Commission*, 440 F.2d 1309, 1310).

approved, are unlawful under Section 15—and thus not exempt from the antitrust laws (See 440 F.2d 1309, 1310). This Court subsequently denied certiorari in the Fifth Circuit case (404 U.S. 881), whereupon the Pacific Westbound Conference and its members settled Carnation's antitrust claim which was still pending.

Similarly, in *American Export & Isbrandtsen Lines* v. *Federal Maritime Commission*, 334 F.2d 185, 198 (9th Cir., 1964), when the Pacific Coast European Conference adopted a practice which allowed its members to *discriminate* among shippers by absorbing certain shippers' port equalization expenses, that practice was declared "*unlawful*" and "*unapproved*" under Section 15 of the Shipping Act, since it was *not* "*within the scope of [the] approved Conference Agreement.*" The Ninth Circuit ruled that "Such agreement contains no provision expressly authorizing port equalization, nor do we find any implicit authority contained therein" (334 F.2d 198).

When *Carnation*, *Pacific Westbound Conference* and *American Export Lines*, *supra*, are correctly applied in the case at bar, it immediately becomes apparent that the Pacific Westbound Conference's approved charter under Section 15 does no more than grant respondents the strictly limited privilege of acting in concert to fix and enforce rates that do *not unreasonably or unfairly discriminate among competing shippers* (App. 70a). Thus, while the Conference's approved charter immunizes *non-discriminatory rate-fixing* from the antitrust laws under Section 15, it concomitantly *does not immunize unfair, unreasonable, discriminatory, anticompetitive rate-fixing* (App. 70a). That type of rate-fixing, which destroys competition and restrains trade, was obviously not even contemplated by either the Conference or the Commission's predecessor when the latter approved the Conference's charter in 1923. That type of destructive rate-fixing is "not within the scope of the approved Conference agreement"; it is, in fact, prohibited by that approved agreement; and therefore it is not entitled to any exemption from the antitrust laws under Section 15 of the Shipping Act in this case.

In this regard, the D.C. Circuit recently ruled in *Interpool Ltd.* v. *Federal Maritime Commission*, at 663 F.2d 142, 149 (1980):

> "Although these conferences have been authorized to set rates and charges, the courts and the Commission have consistently held that such general authorizations do not permit conferences to act in a manner that will affect competition in a manner unforeseen when the conference agreements were approved."

Thus, the Ninth Circuit erred by summarily concluding—contrary to the allegations of the complaint herein and the findings of the ALJ and the D.C. Circuit in *National Assn. of Recycling Industries* v. *F.M.C.*, *supra*—that the type of discriminatory, anticompetitive, destructive rate-fixing involved in this case "is authorized by the FMC-approved [Conference] agreement" (App. 7a). On the contrary, it is prohibited thereby, and wholly beyond the scope of that agreement.[11] Under this Court's decision in *Carnation*, therefore, the complaint should be reinstated because respondents' unapproved rate-fixing activities are unlawful under Section 15 and not exempt from the antitrust laws.

II

The Ninth Circuit's Decision Also Clashes With Other Decisions Of This Court In That It Erroneously Grants Sweeping Antitrust Immunity Under Section 15 Of The Shipping Act To An Unapproved Monopolistic Rate-Fixing Combination Of Carriers And Shippers Which Has Constantly Utilized, As Its Most Effective Anticompetitive Weapon, Secret Preferential Rate-Fixing Agreements That Are Not Subject To Regulatory Control Under The Shipping Act, And Thus Have Likewise Never Been Approved Under Section 15.

In the case at bar, the alleged facts—all of which were established in the prior marathon Shipping Act proceedings—

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[11] As demonstrated above, the Ninth Circuit's reliance on the Fifth Circuit's decision in *Pacific Westbound Conference* v. *F.M.C.*, *supra*, and *American Export & Isbrandtsen Lines* v. *F.M.C.*, *supra*, was exceedingly misplaced (App. 7a). Its reliance on *Dreisbach* v.

make it clear that here petitioners are *not* seeking to impose unfair antitrust liability on respondents for mere "routine rate-making" activities, wholly within the scope of the Pacific Westbound Conference's organic charter, as the courts in the Ninth Circuit have ruled (App. 4a-7a; 18a-20a). Nor do petitioners merely allege that "wastepaper rates are too high," as the Ninth Circuit inexplicably suggests (App. 2a).

Rather, petitioners charge that here respondent carriers, who monopolize the transportation of 95% to 99% of all wastepaper exports to the Far East, have constantly combined among themselves and with *the wastepaper shippers' competitors*—especially the Japanese cartels that purchase and ship competing wood chips from the West Coast to the Far East—to fix rates for the competing commodities that constantly "outrageously" discriminate against wastepaper shippers and seriously restrain wastepaper exports (App. 33a-37a; Confidential Ex. 99).[*] This alleged rate-fixing combination, and its resulting restraints of trade, are thus similar to those outlawed by this Court under the antitrust laws almost a century ago, soon after the Sherman Act became effective. *Swift and Company* v. *United States*, 196 U.S. 375 (1905); *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290 (1897); and *United States* v. *Joint Traffic Assn.*, 171 U.S. 505 (1898).

The record before the Court shows that respondent "Big Six" Japanese carriers have always played an extremely in-

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Murphy, 658 F.2d 720 (9th Cir. 1981) is similarly misplaced (App. 7a). There, the Court merely reiterated that immunity from the antitrust laws under Section 15 of the Shipping Act depends entirely on whether or not the challenged activities lie within the scope of the FMC-approved agreement involved in each case (658 F.2d 724-729). Here, the challenged rate-fixing is prohibited by the agreement the FMC approved.

[*] See also *Nat. Assn. of Recycling Industries* v. *F.M.C.*, *supra*, at 658 F.2d 822-824.

fluential role in the Pacific Westbound Conference. They constitute 1/3 or more of the Conference's membership, and rates can be fixed at any time by a 2/3s vote of the Conference's members (App. 72a 75a; CR 24, p. 67). Consequently, the Japanese carriers have constantly played an important part in the Conference's monopolistic wastepaper rate-fixing activities. The record demonstrates, however, that while these carriers continuously combined with other carrier members of the Conference's wastepaper transportation monopoly to impose rates on petitioners and other U.S. wastepaper shippers that were outrageously unreasonable and grossly discriminatory when measured against "open" rates concomitantly fixed by Conference members for essentially the same transportation services for competing virgin woodpulp shippers, *all* of the Big Six Japanese carriers were simultaneously combining *outside the Conference* with petitioners' other competitors—the virgin wood chip shippers—to make and perform *secret rate-fixing agreements* which fixed the wood chip shippers' rates for long periods of years at levels 4 times lower than the monopolistic wastepaper rates fixed by respondents through the Conference (App. 33a-37a; 57a-64a; *Confidential Ex. 99*).[13] *None of these secret rate-fixing agreements, fixed in combination by the Japanese carriers and the wood chip shippers, are subject to regulatory control under the Shipping Act, and thus none were ever filed or approved under Section 15.*[14]

As stated above, this powerful rate-fixing combination of carriers and shippers, and its most important weapon, the secret, unapproved wood chip rate-fixing agreements, were extremely effective and extraordinarily anticompetitive. Wood chip exports from the West Coast to the Far East skyrocketed from zero tons in 1965 to more than 4,000,000 tons a year shortly thereafter, while U.S. wastepaper shippers constantly suffered loss of sales, loss of markets and loss of profits (App. 58a; 60a-64a).

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[13] *Id.*, at 658 F.2d 822-824.

[14] *Id.*, at 658 F.2d 820.

Viewed as a *whole*, as this Court directed in *Swift & Company* v. *United States*, 196 U.S. 375, 394-98 (1905) and *Continental Ore* v. *Union Carbide and Carbon Co.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 1410 (1962), this monopolistic rate-fixing combination of carriers and shippers plainly is *not* entitled to a sweeping exemption from the antitrust laws simply because the Pacific Westbound Conference's organizational charter was approved 60 years ago under Section 15 of the Shipping Act, as the Ninth Circuit has ruled (App. 4a-7a). Looking at "the economic reality of the relevant transactions" under this Court's decision in *United States* v. *Concentrated Phosphate Export Association*, 393 U.S. 199, 208-210, 89 S.Ct. 361, 366-67 (1968), it immediately becomes clear that the combination's most important anticompetitive weapon—the secret, totally unapproved rate-fixing agreements the Japanese carriers and the Japanese cartels made and performed completely *outside the Conference*, and *totally beyond the scope of the Conference's charter*—have no claim whatsoever to antitrust immunity under either the Conference's charter or Section 15, and thus they, and the *whole* rate-fixing combination which utilized them so forcefully, is *non-exempt*.

This Court has made it plain that "[I]f contracts are not approved by the Commission [under Section 15], the antitrust laws are fully applicable to them." *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 728, 93 S.Ct. 1773, 1776 (1973); *Carnation Co.* v. *Pacific Westbound Conference*, *supra*, at 383 U.S. 216, 86 S.Ct. 784. In *Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 404 F.2d 804, 818 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093, 89 S.Ct. 872 (1969), it was specifically ruled that when so-called tramp divisions of respondent Japanese carriers operate, as they have here, *outside the scope of approved Conference agreements* to fix rates directly with shippers, the antitrust laws are fully applicable when those rate-fixing arrangements, which are *not* subject to regulation under the Shipping Act, result in a restraint of trade.

Similar rulings were made by the Fifth Circuit in *Pacific Westbound Conference* v. *Federal Maritime Commission*, *supra*, at 440 F.2d 1309, 1310, and in the Second Circuit in *Ocean Shipping Antitrust Litigation*, 500 F.Supp. 1235 (S.D. N.Y. 1980).

Moreover, this Court has repeatedly ruled that entities, such as respondent carriers in this case, which might be entitled to a statutory antitrust exemption when they *alone* act lawfully in concert, lose that exemption *when they act in concert with non-exempt parties*, such as the wood chip shippers in this case. *Group Life & Health Ins.* v. *Royal Drug Co.*, 440 U.S. 205, 231-32, 99 S.Ct. 1067, 1083 (1979); *Ramsey* v. *Mine Workers*, 401 U.S. 302, 313, 91 S.Ct. 658, 665 (1971); *Case-Swayne Co.* v. *Sunkist Growers*, 389 U.S. 384, 395-396, 88 S.Ct. 528, 534-35 (1967); *United States* v. *Borden Co.*, 308 U.S. 188, 204-205, 60 S.Ct. 182, 191 (1939).

In this case, therefore, the Pacific Westbound Conference's partial exemption from the antitrust laws under Section 15 of the Shipping Act must be "narrowly construed" and carefully restricted, as this Court ruled in *Group Life & Health Ins.* v. *Royal Drug Co.*, *supra* at 440 U.S. 231, *Abbott Laboratories* v. *Portland Retail Druggists*, 425 U.S. 1, 11-12, 96 S.Ct. 1305, 1313 (1976), and *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, *supra* at 411 U.S. 735—*not* baselessly expanded to *non-Conference* rate-fixing combinations of *carriers and shippers*, as the Ninth Circuit did here. Certiorari is essential so the Ninth Circuit's dangerous, erroneous rulings in this regard may be corrected.

III

The Ninth Circuit's Decision Clashes With Additional Decisions Of This Court—And Concededly It Also Irreconcilably Conflicts With Decisions From Other Circuits—Which Hold That A Regulatory Statute, Enacted To Immunize Lawful, Nondiscriminatory, Private Ratemaking Activities, May Not Be Perverted To Exempt Monopolistic, Discriminatory Rate-Fixing Activities That Violate The Regulatory Statute Itself, Restrain Commerce And Operate Contrary To The Public Interest.

Both the district court and the Ninth Circuit recognized that, while the Pacific Westbound Conference's organic charter was approved under Section 15 of the Shipping Act 60 years ago, all of the monopolistic, discriminatory *rates* challenged by the complaint in this case were thereafter *privately-fixed* by respondents, without any active participation or advance approval of the Federal Maritime Commission or any other federal agency (App. 1a; 13a, 18a).[5] Both courts also realized that before this antitrust action was even commenced, the District of Columbia Circuit ruled that, inescapably, respondents' privately-fixed rates in this case violate Section 18(b)(5) of the Shipping Act, 46 U.S.C. § 817(b)(5); are detrimental to commerce of the United States and contrary to the public interest. *National Association of Recycling Industries, Inc.* v. *Federal Maritime Commission*, *supra*, at 658 F.2d 825 (App. 2a, 3a; 11a).

The two courts nevertheless erroneously cloaked those *unlawful, unreasonable, discriminatory rates* with unlimited immunity from the antitrust laws solely because respondent

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[5] Section 15 of the Shipping Act provides that, while rate-fixing agreements, understandings and conference charters must be approved in advance by the Commission, tariff rates may be fixed and charged by carriers and conferences "without advance approval" (46 U.S.C. § 814). Both Sections 15 and 18 of the Shipping Act, however, prohibit carriers and conferences from adopting rates *not* "in accordance with law", or which are unreasonable or detrimental to commerce (46 U.S.C. §§ 814, 817(b)(5)).

Pacific Westbound Conference holds the aforesaid approved charter under Section 15 of the Shipping Act (App. 21a; 2a; 70a). Both courts necessarily concede that their *unprecedented* rulings irreconcilably clash with the decision from the Second Circuit in *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 285 F.Supp. 949 (S.D. N.Y. 1968), *cert. denied sub nom. Japan Line, Ltd.* v. *Sabre Shipping Corp.*, 407 F.2d 173 (2d Cir. 1969), *cert. denied* 395 U.S. 922, 89 S.Ct. 1774 (1969) (App. 5a-6a; 15a). The Ninth Circuit also acknowledges the inconsistency of its decision with the recent decision in the District of Columbia Circuit in *United States* v. *Baltimore & Ohio R.R. Co.*, 538 F.Supp. 200, 206-209 (D.C. D.C. 1982), *aff'd sub nom. United States* v. *Bessemer & Lake Erie R.R.*, 717 F.2d 593 (D.C. Cir. 1983) (App. 6a).

This Court has repeatedly ruled in recent years that "even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization." *City of Lafayette, La.* v. *La. Power & Light Co.*, 435 U.S. 389, 417, 98 S.Ct. 1123, 1138-39 (1978); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 372-375, 93 S.Ct. 1022, 1027-28 (1973); *State of Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 457-462, 65 S.Ct. 716, 726-728 (1945). Here, both Section 18(b)(5) of the Shipping Act and the Conference's own approved charter under Section 15 of the Shipping Act *expressly prohibit* the type of *unreasonable, preferential, discriminatory* rate-fixing activities challenged by the complaint, so in this instance respondents plainly sought "to extend or exploit [their] monopoly in a manner not contemplated" by that approved charter. There is nothing in that charter which "clothes with legality a conspiracy to discriminate." *State of Georgia* v. *Pennsylvania R. Co.*, *supra*, at 324 U.S. 458.

Moreover, Commission approval of the Conference's *facially benign* charter under Section 15 of the Shipping Act could *not* possibly have contemplated that said charter would be utilized repeatedly to violate rate-fixing prohibitions contained in the Shipping Act itself. It would be "a perversion" of Section

15 to hold that it was intended to legalize and approve a rate-fixing combination which constantly violates rate-fixing prohibitions contained in other sections of the same statute. *State of Georgia* v. *Pennsylvania R. Co.*, *supra*, at 324 U.S. 457. On the contrary, Section 15 specifically mandates on its face that the Federal Maritime Commission "shall by order . . . *disapprove, cancel* or *modify*" any conference charter—*including those previously approved*—found to be operating (1) in violation of the Shipping Act, (2) discriminatorily among competing shippers or exporters, (3) detrimentally to U.S. commerce, or (4) contrary to the public interest (See 46 U.S.C. § 814).

Finally, while the Commission, whose "*laxity challenges the very character of the [Shipping] Act*," *National Association of Recycling Industries, Inc.* v. *F.M.C.*, at 658 F.2d 818, has failed effectively to regulate the Pacific Westbound Conference and its members in areas where it does have jurisdiction under the Shipping Act, the Commission simultaneously has *no* jurisdiction (i) to *participate* in the Conference's secret rate-fixing processes, (ii) to *approve* rates fixed by the Conference and its members *before* they are imposed on shippers, or (iii) to *regulate* in any respect the secret rate-fixing agreements the Big Six Japanese carrier members of the Conference have made with petitioners' competitors, the Japanese cartel wood chip shippers. Thus, it was totally erroneous for the Ninth Circuit to rule that the Commission's approval of the Conference's facially benign charter six decades ago somehow operates also to immunize all of respondents' subsequent *unregulated, independent* rate-fixing actions from antitrust scrutiny. This Court has repeatedly ruled that "Even when an industry is regulated substantially, this does not necessarily evidence an intent to repeal the antitrust laws with respect to every action taken within the industry"; and that "antitrust repeals are especially disfavored where the antitrust implications of a business decision have not been considered by a

governmental entity." *National Gerimedical Hospital & Gerontology* v. *Blue Cross*, 452 U.S. 378, 388-393, 101 S.Ct. 2415, 2421-24 (1981); *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105-106, 100 S.Ct. 937, 943 (1980); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 597-98, 96 S.Ct. 3110, 3121 (1976); *State of Georgia* v. *Pennsylvania R. Co.*, *supra*, at 324 U.S. 458-460; *Northrop Corp.* v. *McDonnell Douglas Corp.*, 705 F.2d 1030, 1056-57 (9th Cir. 1983), *cert. denied* 104 S.Ct. 156 (1983).

It is hardly surprising, therefore, that the Ninth Circuit's unprecedented decision, which inexplicably fails to follow these basic antitrust concepts, conflicts so irreconcilably with the decisions from the Second Circuit in *Sabre Shipping Corp.*, *supra*, and *Ocean Shipping Antitrust Litigation*, *supra*, and the District of Columbia Circuit's decision in *United States* v. *Bessemer & Lake Erie R. Co.*, *supra*. In *Sabre*, many of the respondents in this case utilized their monopolistic rate-fixing powers under approved conference charters to drive rates so low that Sabre Shipping Corp., a non-Conference competitor in the Pacific eastbound trade, was forced out of business and into bankruptcy. As in the case at bar, the Maritime Commission conducted an investigation under the Shipping Act and roughly 5 years later, an ALJ ruled the unreasonable, discriminatory rates violated Section 18(b)(5) of the Act (285 F.Supp. 949, 953). Sabre thereupon sued under the Sherman and Clayton Acts, but like respondents in this case, the conferences and their carrier members moved to dismiss, contending their rates, *no matter how unlawful under the Shipping Act*, were immunized from antitrust liability by the conference charters which had been approved under Section 15 of the Shipping Act (285 F.Supp. 954, 955). The courts in the Second Circuit denied the motion to dismiss, stating: "The mere fact that agreements setting rates are permitted . . . does not mean that, irrespective of their effect on commerce of the United States, [illegal rates] may be enjoyed until defendants are caught, only to be released from all past liability simply by discontinuing those rates. If this were the law, antitrust limita-

tions on rate agreements, which are price-fixing agreements and per se antitrust violations, would be non-existent and the [defendants] would enjoy an extraordinarily privileged status" (285 F.Supp. 955). Both this Court, and the Second Circuit before it, denied certiorari (407 F.2d 173; 395 U.S. 922); and Sabre's antitrust claim was settled. *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F.Supp. 1339 (S.D.N.Y. 1969).

In *Ocean Shipping Antitrust Litigation, supra*, defendant carriers, which operated under seven approved conference charters in the United States/Europe trade, fixed unreasonable, discriminatory rates pursuant to secret rate-fixing agreements, which, like the Japanese carriers' rate-fixing agreements in this case, had not been approved under Section 15 (500 F.Supp. 1235, 37). The carriers moved to dismiss an antitrust action brought by shippers, contending "the Commission has exclusive jurisdiction over ocean shipping rates so that all rate-fixing activities by ocean carriers have implied immunity from the antitrust laws" (500 F.Supp. 1239). The court in New York relied on this Court's decision in *Carnation Co.* v. *Pacific Westbound Conference, supra*, and flatly denied the carriers' motion (500 F.Supp. 1239-1241). The court stated: "In sum, we find that the implementation of unapproved agreements, including . . . the establishment of rates . . . , is not immune from the antitrust laws" (500 F.Supp. 1241). The shippers' antitrust claims were thereupon settled by the carriers (CR 29, p. 62-66).

Finally, in *United States* v. *Bessemer & Lake Erie R. Co., supra*, rail carriers which operated under a rate-fixing agreement approved by the Interstate Commerce Commission in 1950 under Section 5a of the Interstate Commerce Act, thereafter engaged in anticompetitive, discriminatory rate-fixing activities which were not in conformity with the approved rate agreement. The carriers were thus indicted for criminal violations of the Sherman Act. One of the indicted carriers contended that the approved rate-fixing agreement under the Commerce Act immunized its anticompetitive conduct from

prosecution under the antitrust laws (717 F.2d 595). The District of Columbia Circuit rejected the claim, stating: "[T]he section 5a immunity reaches *only* those actions actually taken 'in conformity with' the rate agreement . . . It does not sweep within it a larger conspiracy which utilizes a Section 5a rate bureau as a means to an end; it does not legitimize *illegal* schemes which happen to coincide at points with the legitimate actions of a rate bureau" (717 F.2d 600).

As stated above, the Ninth Circuit's decision, which conflicts with all of the aforesaid rulings, is truly *unprecedented*. Surely its reliance on *Yellow Forwarding Co.* v. *Atlantic Container Line*, 498 F.Supp. 105 (E.D. Mo. 1980), *aff'd.* 668 F.2d 350 (8th Cir. 1981), *cert. denied* 456 U.S. 962, *Baton Rouge Marine Contractors, Inc.* v. *Cargill, Inc.*, 1976-2 Trade Cases (CCH) ¶ 61,212 (E.D. La. 1976), and *Dreisbach* v. *Murphy*, 658 F.2d 720 (9th Cir. 1981), is gravely misplaced. None of those cases involved monopolistic, discriminatory rate-fixing practices that plainly violated the terms of an approved charter which authorized only reasonable, non-discriminatory rate-fixing. None of those cases involved secret, unapproved, anticompetitive rate-fixing agreements between carriers and shippers that are totally beyond the jurisdiction of the Shipping Act. And, none of those cases involved rate-fixing activities found to violate Section 18(b)(5) of the Shipping Act itself. Indeed, the common thread which runs through all three cases is that they each involve antitrust complaints against routine maritime activities found to be totally within the scope of previously approved agreements under Section 15 of the Shipping Act. See *Yellow Forwarding*, at 668 F.2d 353, 354; *Baton Rouge Marine Contractors*, at page 70, 531; *Driesbach*, at 658 F.2d 727-729. But, as the Louisiana court emphasized in *Baton Rouge*, at page 70, 531: "Of course, the Shipping Act does not shelter illegal conduct clearly beyond the scope of the statute."

Accordingly, certiorari is imperative in this case to set aside and correct the Ninth Circuit's erroneous ruling that even discriminatory, unapproved rate-fixing actions that violate the Shipping Act itself are exempt from the antitrust laws simply

because a conference of carriers holds a facially benign charter under Section 15 of the Shipping Act which licenses only lawful, nondiscriminatory rate-fixing.

IV

Finally, The Ninth Circuit's Decision Also Conflicts With This Court's Decision In *Carnation Co.* v. *Pacific Westbound Conference* By Suggesting That Petitioners Are Foreclosed From Relief Under The Antitrust Laws Because Allegedly Remedies Exist Under The Shipping Act.

The Ninth Circuit's decision implies that petitioners cannot seek relief under the antitrust laws in this case because, in its view at least, "private remedies do exist under the Shipping Act" (App. 7a). However, that same contention was made and flatly rejected by this Court in *Carnation Co.* v. *Pacific Westbound Conference*, *supra*, at 383 U.S. 224. This Court ruled: "Petitioner's failure to seek Shipping Act reparations does not affect its rights under the antitrust laws. The rights which petitioner claims under the antitrust laws are *entirely collateral* to those which petitioner might have sought under the Shipping Act" (383 U.S. 224).

In this case, if petitioners' remedy under the antitrust laws is unfairly taken away, they face the prospect of no remedy at all. First, both the Commission and the Ninth Circuit acknowledge that *no* reparations may be recovered for *past* rate-fixing violations of Section 18(b)(5) of the Shipping Act in response to the D.C. Circuit's rulings in *National Association of Recycling Industries* v. *F.M.C.*, *supra* (CR 34, p. 4, 5; App. 7a). Secondly, the Commission is powerless to award reparations or any other relief under the Shipping Act for the loss of sales and profits petitioners suffered by reason of respondents' secret rate-fixing agreements with shippers *beyond the jurisdiction of the Shipping Act*. Finally, while the Ninth Circuit vaguely suggests that reparations might be recovered for violations of Sections 16 and 17 of the Shipping Act under 46 U.S.C. § 821, the Commission has provided no such remedy after more than 10 years of fruitless investigation under the Shipping Act, and

has not indicated any intention to do so now. Indeed, the Commission has arbitrarily and capriciously stalled and foreclosed all avenues of relief under the Shipping Act in this case, and continues to do so today.

In any event, the complaint in this case "does not seek to have the Court act in the place of the Commission," nor does it "undercut or impair the primary jurisdiction of the Commission over rates." Rather, it seeks "to free the rate-making function of the influences of a conspiracy over which the Commission has no authority, but which . . . can only hinder the Commission in the tasks with which it is confronted." *State of Georgia* v. *Pennsylvania R. Co.*, at 324 U.S. 459, 460; *Ocean Shipping Antitrust Litigation*, *supra*, at 500 F.Supp. 1241-1244.

CONCLUSION

The petition for certiorari should be granted and the erroneous decision of the United States Court of Appeals for the Ninth Circuit should be vacated and set aside. The lower courts erred by summarily dismissing the complaint without affording petitioners a fair opportunity to develop the alleged facts. *Conley* v. *Gibson*, 355 U.S. 41, 78 S.Ct. 99 (1957). The monopolistic, discriminatory, anticompetitive rate-fixing activities of respondents in this case are not cloaked with antitrust immunity under the Shipping Act, and they constitute *per se* concerted rate-fixing violations of the Sherman Antitrust Act under this Court's decisions in *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290, 341-42 (1897), *United States* v. *Joint Traffic Association*, 171 U.S. 505 (1898), *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940), *International Salt Co.* v. *United States*, 332 U.S. 392, 396 (1947), *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958), *Catalano* v. *Target Sales, Inc.*, 446

U.S. 643, 647 (1980), and *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 102 S.Ct. 2466, 2473-2480 (1982).

Respectfully submitted,

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Dated: January ____, 1984

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No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., ASSIGNEE OF BERG MILL SUPPLY CO., INC., CONSOLIDATED FIBRES, INC., PAPER FIBERS, INC., and SASSOON INTERNATIONAL CORPORATION,

Petitioners,

v.

AMERICAN MAIL LINE, LTD., PACIFIC WESTBOUND CONFERENCE, JAPAN LINE, LTD., KOREA MARINE TRANSPORT CO., LTD., MITSUI O.S.K. LINES, LTD., SEA-LAND SERVICE, INC., SHOWA LINE, LTD., *et al.*,

Respondents.

APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, ISSUED AND FILED ON NOVEMBER 14, 1983, WHICH IS THE SUBJECT OF THE PETITION FOR CERTIORARI IN THIS CASE

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-5551
DC # CV-82-895-LTL

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., *et al.*,
Plaintiffs-Appellants,

v.

AMERICAN MAIL LINE, LTD., *et al.*,
Defendants-Appellees.

OPINION

Appeal From The United States District Court For The Central District Of California, Lawrence T. Lydick, District Judge, Presiding; Argued And Submitted September 9, 1983

Before: SCHROEDER and CANBY, Circuit Judges, and HOFFMAN,* District Judge.

SCHROEDER, Circuit Judge.

This appeal from the dismissal of an antitrust action requires this court to interpret the antitrust exemption contained in section 15 of the Shipping Act of 1916, 46 U.S.C. § 814 (1976). Section 15 immunizes from the antitrust laws conferences of common carriers that engage in collective rate-making, provided that the rate-making is authorized by agreements which the Federal Maritime Commission (FMC) has approved and provided further that all rates have been properly filed with the FMC. Although individual rates require no separate FMC approval to take effect, under § 18(b)(5) of the Shipping Act,

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*Honorable Walter E. Hoffman, Senior United States District Judge, Eastern District of Virginia, sitting by designation.

the FMC can later disapprove rates that it finds so unreasonably high or low that they are detrimental to United States commerce. 46 U.S.C. § 817(b)(5)(1976). The principal issue in this case is whether shipping rates that the FMC has not disapproved have antitrust immunity if, as plaintiffs allege, they violate § 18(b)(5).

This action was brought by the National Association of Recycling Industries, Inc. (NARI), a trade association of wastepaper exporters to the Far East, and three of its member firms, against a group of common carriers who are present or former members of the Pacific Westbound Conference (PWC). The PWC is a rate-setting organization acting under an FMC-approved agreement. NARI claims that the PWC's rates for shipping wastepaper, which were otherwise authorized by the conference agreement and properly filed with the FMC, are unreasonably high and discriminate against NARI's members. They argue that the rates violate the antitrust laws by preventing wastepaper exporters from competing with exporters of woodpulp and woodchips, rival products in the paper manufacturing process. The district court dismissed the case on the basis of the antitrust immunity granted by section 15 and rejected NARI's contention that section 15 immunity should not apply if the rates are unreasonably high. We affirm.

NARI's antitrust claim has emerged from eleven years of administrative and judicial proceedings involving the PWC's wastepaper rates. In 1972, the FMC began an investigation of possible violations of sections 15, 16 First, 17 and 18(b)(5) of the Shipping Act. 46 U.S.C. §§ 814, 815, 816 and 817(b)(5)(1976). In 1977, the Administrative Law Judge held that the rates violated sections 15 and 18(b)(5), but in March 1979, the FMC reversed the ALJ's decision and found the wastepaper rates to be lawful.

On NARI's petition for review, the District of Columbia Circuit vacated the FMC's approval of the wastepaper rates. *National Association of Recyclers, Inc.* v. *FMC*, 658 F.2d 816 (D.C. Cir. 1980). There the court stated that it "appear[ed]

inescapable" that the rates violated section 18(b)(5) of the Shipping Act. *Id.* at 825. Rather than affirming the ALJ's statements concerning antitrust immunity, however, the court ruled only that the FMC could not approve the rates based on the existing administrative record. *Id.* at 829. Although the FMC has held its docket open for final determination of the rates' legality, all litigation has since shifted to this antitrust action.

NARI now seeks treble antitrust damages for the entire period since proceedings began in 1972, arguing that because of the District of Columbia Circuit's indication that the PWC's wastepaper rates violated section 18(b)(5), the rates have never been lawful and therefore do not qualify for section 15 immunity. Section 15 states:

> Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1 to 11 and 15 of Title 15, and amendments and Acts supplementary thereto.

The exemption granted by section 15 has been extended to include "activities conducted pursuant to approved agreements" as well. *Yellow Forwarding Co.* v. *Atlantic Container Line*, 668 F.2d 350, 352 (8th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982).

As so construed, the statute reveals a major textual flaw in plaintiffs' position. While NARI argues that the antitrust immunity does not apply because the rates are unlawful under section 18, the immunity contained in section 15 extends to activities lawful "under this section," that is, section 15. As long as the FMC has not disapproved the rates they are lawful under section 15, and appear to be entitled to immunity under the language of the statute.

Furthermore, Supreme Court case authority does not support NARI's interpretation of section 15. In contending that a rate which may be described as "unlawful" under section 18(b)(5) is outside the scope of section 15 immunity, NARI

relies upon language in *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 86 S. Ct. 781 (1966), that "unlawful rate-making activities are not exempt." *Id.* at 217, 86 S. Ct. at 784. The holding in *Carnation Co.*, however, is limited to agreements which the FMC has not approved. *Id.* at 216, 86 S. Ct. at 783. In later cases, the Supreme Court has indicated that the approval process itself shields conference agreements from the antitrust laws. *See FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 728, 93 S. Ct. 1773, 1776 (1973); *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 390 U.S. 261, 271, 88 S. Ct. 929, 935 (1968).

Other courts and the FMC have construed section 15 to mean that activities authorized by approved agreements receive antitrust immunity even if they violate other Shipping Act provisions or other statutes. *See Yellow Forwarding Co.* v. *Atlantic Container Line*, 498 F. Supp. 105 (E.D. Mo. 1980), *aff'd*, 668 F.2d 350 (8th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982); *Baton Rouge Marine Contractors, Inc.* v. *Cargill, Inc.*, 1976-2 Trade Cas. (CCH) ¶ 61,212 (E.D. La. 1976). *See also Dreisbach* v. *Murphy*, 658 F.2d 720 (9th Cir. 1981). The same principle can be applied from the other direction as well; a rate which is set under an agreement that the FMC has not approved does not enjoy antitrust immunity. *See Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. at 217, 86 S. Ct. at 784. Moreover, carriers acting under approved agreements lose their antitrust immunity if they continue to charge rates that the FMC has disapproved. 46 U.S.C. § 814 (1976).

Plaintiffs in this case, however, seek to impose retroactive antitrust liability for allegedly unreasonably high rates which have been set pursuant to an approved agreement and which have not yet been disapproved by the FMC. That result in our view would be fundamentally contrary to the Congressional intent behind the Shipping Act's regulatory scheme. The possibility of such potential retroactive liability for rates later declared unlawful would place carriers in a position of great uncertainty and would force them to seek formal FMC approval in connection with every rate change. Yet the language of

section 15 clearly indicates that Congress intended to give carriers the latitude to enact new rates, without separate approval, to meet quickly changing market conditions. *See Interpool Ltd.* v. *FMC*, 663 F.2d 142, 147-48 (D.C. Cir. 1980).

The only case in accord with NARI's reading of section 15 is *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 285 F. Supp. 949 (S.D.N.Y. 1968), *cert. denied sub nom. Japan Line, Ltd.* v. *Sabre Shipping Corp.*, 407 F.2d 173 (2d Cir.), *cert. denied*, 395 U.S. 922 (1969). *Sabre's* holding that section 15 immunity can be lost if shipping rates violate section 18(b)(5) has never been followed, and we agree with the district court that it is unpersuasive authority for imposing antitrust liability here.[1]

Plaintiffs' efforts to find support in cases involving section 5a of the Interstate Commerce Act, 49 U.S.C. § 10706 (Supp. V 1981) are also unavailing. The Commerce Act analogy is of limited usefulness to a Shipping Act case since the statutes contain different criteria for approval of collective ratemaking, and their legislative histories reflect different concerns. As Professor Sullivan has noted,

> It is important to recognize that there is no single conception which defines the scope of the exemption for a regulated industry. Although one can draw on case law from one industry for guidance as to outcome in another, there are, in a sense, as many sets of exemption doctrines as there are industries subject to state or federal regulation. In each industry the process of accommodating regulatory

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[1] *Sabre* was never the subject of appellate review on the merits. After the district court decided the immunity question, it denied the defendants' motion to stay the action pending FMC examination of the rates in question. The defendants filed an extraordinary petition for a writ of certiorari challenging the denial of the stay and the Second Circuit ruled only on the appropriateness of the petition. *Japan Line, Ltd.* v. *Sabre Shipping Corp.*, 407 F.2d 173, 174 (2d Cir. 1969). The case subsequently settled without trial. *See Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F. Supp. 1339 (S.D.N.Y. 1969).

> doctrine to antitrust doctrine is responsive to particulars such as those here referred to and, in some degree no doubt, to the degree of confidence which the court has and the quality of the regulatory performance by the particular regulatory agency.

L. Sullivan, *Handbook of the Law of Antitrust* § 239 at 743-44 (1977), *quoted in Northrop Corp.* v. *McDonnell Douglas Corp.*, 705 F.2d 1030, 1056 n.34 (9th Cir.), *cert. denied*, 52 U.S.L.W. 3234 (U.S. Oct. 3, 1983)(No. 83-88). However, even under the Commerce Act, courts grant antitrust immunity to rates established pursuant to ICC-approved agreements and in accordance with agency procedures. *See Board of Trade of City of Chicago* v. *ICC*, 646 F.2d 1187 (7th Cir. 1981).

NARI places particular reliance upon the District of Columbia Circuit's recent decision in *United States* v. *Bessemer Lake Erie Railroad Co.*, No. 82-2065 (D.C. Cir. Aug. 30, 1983). In *Bessemer*, defendants already had pleaded *nolo contendere* to criminal antitrust charges, and the court held that they could not invoke the civil antitrust immunity conferred by section 5a. Although *Bessemer* contains broad language criticizing abuse of immunized activities, the case does not support ignoring the express antitrust immunity granted under section 15 of the Shipping Act, because *Bessemer* involved both criminal charges and agreements wholly outside the scope of ICC-sanctioned rate-making.

NARI argues in the alternative that section 15 immunity does not apply because the wastepaper rates constitute conference activity outside the scope of the approved agreement. NARI reasons that since Article 2 of the PWC's conference agreement contains an anti-discrimination clause closely resembling sections of the Shipping Act[2] and since the PWC's shipping rates allegedly discriminate against wastepaper ex-

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[2] Article 2 states:

> There shall be no undue preference or advantage nor unreasonable discrimination against any consignor or consignee by any of the parties hereto.

porters, the rates are outside the scope of the agreement and therefore not entitled to immunity.

We agree with the district court's conclusion that if liability does not exist by virtue of the Shipping Act, it should not exist for a violation of similar provisions contained in the conference agreement. As the district court observed:

> [i]t would be anomalous to hold that defendants are exempt from application of the antitrust laws even if violation of the Shipping Act could be established, and then to hold that defendants were so liable for writing into their agreement provisions of the Shipping Act that they were bound by anyway.

National Association of Recycling Industries, Inc. v. *American Mail Line, Ltd.*, No. CV 82-895-LTL, slip op. at 16 (C.D. Cal. Dec. 3, 1982).

Our own decisions support the conclusion of the district court that so long as the activity in question, in this case rate-making, is authorized by the FMC-approved agreement, the defendants cannot be said to have acted outside the scope of the agreement. *Dreisbach* v. *Murphy*, 658 F.2d 720 (9th Cir. 1981); *American Export & Isbrandtsen Lines* v. *FMC*, 334 F.2d 185 (9th Cir. 1964). *See also Pacific Westbound Conference* v. *FMC*, 440 F.2d 1303 (5th Cir.), *cert. denied*, 404 U.S. 881 (1971).

NARI argues that, absent antitrust liability, it is left without any effective remedy. Private remedies do exist under the Shipping Act, however. These include: reparations as far back as two years prior to the proceedings' commencement for violations of sections 16 and 17, 46 U.S.C. § 821 (1976); prospective rate relief for violations of section 18(b)(5), 46 U.S.C. §§ 814, 822 (1976); and injunctive relief if an FMC order is disobeyed. 46 U.S.C. § 828 (1976). The FMC also may impose civil and criminal penalties up to $5,000 per day. 46 U.S.C. §§ 815, 817(b)(6), 831 (1976). The path to more effective remedies begins in Congress, not the courts.

Plaintiffs' final attempt to salvage this action rests upon certain contracts that some of the defendants made with other carriers for the shipment of woodchips. Plaintiffs stress that these contracts, which provide for lower rates than the ones which plaintiffs must pay for shipping their wastepaper, demonstrate that the wastepaper rates are too high. The contracts for shipping woodchips may well be telling evidence for that proposition, but the contracts themselves are not alleged in any way to have been consummated in violation of the antitrust laws. Indeed, according to plaintiffs' complaint, the contracts were entered into as a product of free competition. The district court therefore properly dismissed the count of plaintiffs' complaint relating to woodchip rates on the grounds that it failed to state a claim.

Affirmed.

MEMORANDUM OF DECISION ISSUED ON DECEMBER 3, 1982, BY THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA IN THIS CASE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV-82-895-LTL (Kx)

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., as assignee of the claims and actions of its member BERG MILL SUPPLY CO., INC., CONSOLIDATED FIBRES, INC., PAPER FIBERS, INC., and SASSOON INTERNATIONAL CORPORATION, (successor to M. SASSOON & CO., INC.,), individually, and for and on behalf of themselves and a class consisting of all shippers of wastepaper from the West Coast of the United States and Canada to the Far East similarly situated,

Plaintiffs,

v.

AMERICAN MAIL LINE, LTD.; AMERICAN PRESIDENT LINES, LTD.; BARBER BLUE SEA LINE, formerly BARBER LINES, A/S; THE EAST ASIATIC CO., LTD., d/b/a EAC-KNUTSEN LINE; GALLEON SHIPPING CORPORATION; GLOBAL BULK TRANSPORT, INCORPORATED; ISTHMIAN LINES, INC., d/b/a STATES MARINE LINES; JAPAN LINES, LTD.; KAWASAKI KISEN KAISHA, LTD.; KOREA MARINE TRANSPORT CO., LTD.; A. P. MOLLER-MAERSK LINE; MARITIME COMPANY OF THE PHILIPPINES; MITSUI O.S.K. LINES, LTD.; NIPPON YUSEN KAISHA; OOCL-SEAPAC SERVICE-ORIENT OVERSEAS CONTAINER LINES, INC. (VOCC); PACIFIC FAR EAST LINE, INC.: PACIFIC WESTBOUND CONFERENCE; PENINSULAR-ORIENTAL STEAM NAVIGATION CO., d/b/a P & O ORIENT LINES; PHOENIX CONTAINER LINERS, LTD.; THE SCINDIA STEAM NAVIGATION CO., LTD.; SEA-LAND SERVICE, INC., SEA-TRAIN LINES, INC.; SEATRAIN INTERNATIONAL, S.A.; SHIPPING CORPORATION OF INDIA, LTD.; SHOWA LINE, LTD., formerly SHOWA SHIPPING CO., INC.; STATES MARINE INTERNATIONAL CO.; STATES STEAMSHIP CO.; TRANSPORTACION MARITIHA MEXICANA, S.A.; UNITED PHILIPPINE LINES; UNITED STATES LINES, INC.; YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.; WATERMAN STEAMSHIP CORPORATION; and ZIM ISRAEL NAVIGATION CO., LTD.,

Defendants.

MEMORANDUM OF DECISION

This matter is here for decision on two motions by various defendants to dismiss or alternatively to stay, on plaintiffs' motion for summary judgment on issue of liability alone, and on defendant East Asiatic Co., Ltd.'s motion for summary judgment. The Court, having heard oral argument and having considered the voluminous papers and briefs filed herein, finds that plaintiffs' complaint fails to state a claim and must be dismissed pursuant to Rule 12(b)(6), *Federal Rules of Civil Procedure*.

This is an antitrust suit brought by the National Association of Recycling Industries, Inc. ("NARI"), a trade association for the paper recycling industry in the United States, and three of its member firms. The member firms seek to represent a class consisting of all firms which exported or shipped recyclable or recycled wastepaper by water during the time covered in the complaint from the West Coast of the United States and Canada to the Far East aboard the vessels of any of the defendants and who were subject to rates or charges fixed by defendants in combination or concert through defendant Pacific Westbound Conference ("PWC"). The class has not been certified.

PWC is a rate-fixing entity created by an agreement entered into by the individual defendants and approved by the Federal Maritime Commission ("FMC"). The other twenty-nine defendants are all common carriers who are or have been, during the time covered by the complaint, parties to the PWC conference agreement, and who engage in "PWC trade" (shipping traffic from the West Coast to the Far East).

Plaintiffs allege that the rates charged by defendants for transporting plaintiffs' wastepaper to the Far East are so "exceedingly high and unjustly discriminatory" that plaintiffs cannot successfully compete against shippers of processed woodpulp and virgin wood chips, raw materials in direct competition with wastepaper. Plaintiffs allege that the rates violate Sections 15, 16 First, 17 and 18(b)(5) of the Shipping Act, 1916, as amended, 46 U.S.C. §§ 814, 815 First, 816 and

817(b)(5), and that defendants consequently are liable for treble damages for *per se* price-fixing despite the limited antitrust immunity conferred upon defendants by Section 15 of the Act.

PRIOR PROCEEDINGS IN THIS CASE

Defendants' wastepaper rates have been the subject of administrative and judicial proceedings for the past ten years. On July 20, 1972 the FMC initiated an investigation of defendants' wastepaper rates, alleging possible violations of Sections 15, 16 First, 17 and 18(b)(5) of the Act. ALJ Seymour Glanzer issued his Initial Decision on August 15, 1977, finding that defendants had violated Sections 15 and 18(b)(5). The ALJ further found that "PWC misused its conference agreement and operated beyond the scope of the Commission's grant of partial immunity from the antitrust laws." No findings were made as to possible violations of Sections 16 First and 17. The ALJ ordered that the PWC Agreement be modified to exclude wastepaper rates from the conference's rate-fixing authority.

Exceptions to the Initial Decision were filed by both NARI, which had intervened in the proceeding, and by the PWC, among others. By Report dated March 9, 1979 the FMC reversed the Initial Decision, vacated the ALJ's order and found the PWC wastepaper rates lawful under Sections 15, 16 First, 17 and 18(b)(5).

NARI filed a petition for review in the D.C. Circuit. The Court of Appeals ordered that FMC approval of the rates at issue be vacated. *National Ass'n of Recycling Industries* v. *F.M.C.*, 658 F.2d 816 (D.C. Cir. 1980). The court failed to decide the propriety of the rates under Section 15, 16 First and 17, but found that "it appears inescapable that unreasonably high shipping rates for wastepaper set by the PWC monopoly detract from United States Commerce in violation of Section 18(b)(5) of the Act." 658 F.2d *at* 825. The court concluded by holding that "[w]e hold only that these rates may not be approved on the basis of the existing administrative record . . . the Commission is free to engage in any further administrative proceedings in this case not inconsistent with this opinion." 658

F.2d *at* 829. Thus, there has been no final adjudication of the legality of defendants' rates although, as the FMC admits in its papers, "[i]t seems probable that the Court [of Appeals] meant to direct the Commission to issue an order disapproving certain of PWC's wastepaper rates under Section 18(b)(5)."

The FMC did not conduct any further hearings; rather, on January 11, 1982 it served a notice on the parties requesting their views on the need for further administrative proceedings. In response to this notice NARI stated that the litigation had or would shift to this antitrust action and that no further proceedings before the FMC were necessary. PWC requested that the proceedings be held open in anticipation of this lawsuit so that the FMC could eventually determine whether the rates charged violated Section 15 or Section 18(b)(5). The FMC has not removed the proceeding from its docket.

AN OVERVIEW OF THE SHIPPING ACT

Section 15 of the Shipping Act, 46 U.S.C. § 814, allows ocean carriers operating in foreign commerce to enter into agreements, including conference agreements such as that establishing defendant PWC, for the general purpose of controlling competition between and among such carriers. The agreements can, and generally do, encompass the fixing of rates for the services offered by the carriers. These agreements must be approved by the FMC before they can be implemented: "before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement . . ." *Id.* Restated, "agreements . . . shall be lawful only when and as long as approved by the Commission . . ." *Id.* The FMC is required to disapprove, cancel or modify any agreement it finds to be "unjustly discriminatory or unfair as between . . . shippers, . . . or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest . . ." *Id.* Agreements "lawful under this section . . . shall be excepted from [the antitrust laws]." *Id.*

Although the agreements themselves must be approved by the FMC in order to be lawful, rates set pursuant to such agreements, "if otherwise in accordance with law, shall be permitted to take effect without prior approval" upon compliance with certain filing requirements. *Id.* Rates are subject to numerous statutory requirements. Under Section 16 First of the Act it is unlawful for a carrier "[t]o make or give any undue or unreasonable preference or advantage to any particular . . . description of traffic," and any carrier which violates the statute is guilty of a misdemeanor punishable by a fine. 46 U.S.C. § 815 First. Section 17 of the Act prohibits carriers from charging any rate "which is unjustly discriminatory between shippers" and grants the FMC certain powers to remedy any violation it finds. 46 U.S.C. § 816. Finally, Section 18(b)(5) of the Act requires the FMC to disapprove any rate "which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States." 46 U.S.C. § 817(b)(5). Civil penalties for continued violation of this section are also provided.

The Act also provides a private remedy for violations of the various rate regulations. Under 46 U.S.C. § 821 any person aggrieved by an alleged violation of the Act may file a complaint with the FMC and seek reparations for injuries caused by the violations. The FMC can order reparations "if the complaint is filed within two years after the cause of action accrued." *Id.* Prior to 1979 reparations were not awardable if a rate investigation was commenced by the FMC, 46 U.S.C. § 821, but a 1979 amendment to the Act removed the prohibition against reparations in FMC-initiated proceedings. 46 U.S.C. § 821(b). Where conference activities are not covered by Section 15's antitrust immunity aggrieved parties may proceed under either the antitrust laws or under the Shipping Act. *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 224 (1966).

THE SABRE SHIPPING CORP. CASE

Plaintiffs' primary argument is that filed but unapproved rates established under the authority of an FMC-approved agreement are shielded from antitrust attack only if they meet the substantive requirements of the Shipping Act. Thus, where particular rates are found to violate the Shipping Act, the agreement which led to the establishment of those rates loses its antitrust exemption. As applied to this case, plaintiffs argue that since defendants' rates have been found to violate Section 18(b)(5), defendants are liable under the antitrust laws for *per se* price-fixing even though the FMC gave defendants permission to fix the rates in question.

Plaintiffs cite no legislative history to support their interpretation of Section 15's antitrust exemption. Rather, they rely upon the opinion in *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 285 F.Supp. 949 (S.D.N.Y. 1968), *cert. denied*, 407 F.2d 173 (2nd Cir.), *cert. denied*, 395 U.S. 922 (1969). In that case plaintiff, a competitor of two conferences and their members, alleged violations of Sections 1 and 2 of the Sherman Act in that defendants allegedly lowered their rates in order to drive plaintiff out of business (and thus out of competition with defendants). A Hearing Examiner for the FMC had found that the rates established by defendants (which were lowered drastically to drive plaintiff out of business and immediately thereafter raised to prior levels) violated § 18(b)(5); on that basis plaintiff argued that defendants' price-fixing conspiracy was not entitled to protection under Section 15's antitrust exemption. Defendants raised, by means of a motion to dismiss, the same arguments raised by defendants here.

The district court found that tariff rates, although allowed under Section 15 to take effect upon filing, were not automatically "lawful under this section" upon being filed within the meaning of Section 15. Rather, the court found that "something more than filing is necessary before defendants may obtain immunity . . ." 285 F.Supp., at 955. In support of this conclusion the court cited language from the Supreme Court

opinions in *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966), and in *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission*, 390 U.S. 261 (1968). 285 F.Supp. at 955-56. The quoted language states, in part, that the antitrust exemption does not apply to the implementation of unapproved agreements, that the exemption for lawful rate-making activities implies nonexemption of unlawful rate-making activities, and that antitrust immunity results when an agreement is approved, not when it is filed. The court then reasoned that, since the FMC could not approve the rates at issue (because of the § 18(b)(5) violation), those rates could not be lawful or covered by the antitrust exemption. Neither appellate court which subsequently denied certiorari in the case appears to have reviewed the matter on the merits.

Analytically we find *Sabre Shipping* indistinguishable from the case at bar, although there are substantial factual differences between it and this case. *Sabre Shipping* is not, however, binding upon this court and we find that it has little persuasive value.

At the outset, it is our view that the *Sabre Shipping* court's reliance upon *Carnation Co.* and *Volkswagenwerk* is misplaced and that neither of those cases support, either directly or indirectly, the district court's decision. In *Carnation Co.* defendant conferences were sued under the antitrust laws after defendant PWC instituted a rate increase pursuant to an unapproved agreement with another conference. Defendants argued that the Shipping Act repealed all antitrust regulation of the rate-making activities of the shipping industry. The Supreme Court rejected this argument, stating that:

> The Shipping Act contains an explicit provision exempting activities which are lawful under § 15 of the Act from the Sherman and Clayton Acts. This express provision covers approved agreements, which are lawful under § 15, but does not apply to the implementation of unapproved agreements, which is specifically prohibited by § 15. The creation of an antitrust exemption for rate-making activi-

> ties which are lawful under the Shipping Act implies that unlawful rate-making activities are not exempt.

383 U.S. at 216-17.

The *Sabre Shipping* court cited this language for the proposition that unapproved tariff rates, if violative of a substantive rate provision of the Shipping Act, are not exempt from the antitrust laws. The language, however, refers to rate-making activities pursuant to an unapproved agreement, not rate-making activities authorized by an approved, antitrust-immune agreement. By the express terms of the Shipping Act the agreement under which the rates in *Carnation Co.* were established was unlawful and not exempt from the antitrust laws; by the express terms of the Act the agreement in this case was lawful and the rates established pursuant thereto allowed to take effect *without* separate approval by the FMC. As the language in *Carnation Co.* was taken out-of-context by the *Sabre Shipping* court, that language provides little support for the conclusion reached in *Sabre Shipping*.

Volkswagenwerk is similarly cited out-of-context to support a proposition it does not support. In *Volkswagenwerk* defendant shipping lines reached an agreement with a labor union whereby they agreed to set up a fund to compensate employees for technological unemployment. The lines then reached an agreement among themselves as to how to raise money for the fund. The agreement was not filed with the FMC. Petitioner *Volkswagenwerk*, aggrieved with the effect of the assessment formula upon itself (via passed-on costs), filed an administrative complaint with the FMC challenging the lawfulness of the agreement prior to filing and approval by the FMC. The FMC dismissed the complaint, contending that although the agreement was a "cooperative working agreement" within the meaning of Section 15, it was not the type of agreement which required approval because it did not concern competition for shipping business. The Supreme Court reversed the Court of Appeals decision affirming the FMC. Among the arguments advanced by the FMC for not requiring approval of the agreement was the argument that "a narrow construction of § 15

[*i.e.*, a narrow construction of the types of agreements required to be filed and approved under § 15] should be adopted in order to minimize the number of agreements that may receive antitrust exemption." 390 U.S. at 273. In response to this argument the Supreme Court stated that:

> [A]ntitrust exemption results, not when an agreement is submitted for filing, but only when the agreement is actually approved; and in deciding whether to approve an agreement, the Commission is required under § 15 to consider antitrust implications.

390 U.S. at 273-74.

This language was taken by the court in *Sabre Shipping* to support the proposition that rates filed pursuant to an approved agreement could not receive antitrust exemption until actually approved by the FMC. The language, however, was written in response to an argument based upon an incorrect assumption that filed agreements would as a matter of course be approved by the FMC (and receive antitrust immunity) despite their repugnancy to the antitrust laws. It did not address issues surrounding rates expressly allowed under the Shipping Act to take effect upon filing, without prior approval.

THE SCOPE OF THE ANTITRUST EXEMPTION

The Shipping Act, 1916 was passed against a backdrop of an existing conference system developed as a means of averting costly and destructive rate wars in the shipping industry. Congress recognized the advantages of the conference system, but also recognized that the conferences might well abuse their power if given an unqualified antitrust exemption without government supervision. *FMC* v. *Svenska Amerika Linien*, 390 U.S. 238, 242 (1968); see H.R.Doc. No. 805, 63rd Cong., 2d Sess. (1914) ("Alexander Report"). Congress thus created a predecessor to the FMC and gave it the authority to modify or disapprove conference agreements, and gave antitrust immunity to agreements receiving the approval of the Board. *Svenska Amerika Linien, supra.*

As evolved, the statutory scheme requires carriers to submit proposed agreements for approval before implementing them. In deciding whether to approve or disapprove a conference agreement the FMC is required to consider antitrust implications. *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 739 (1973). Modifications or cancellations of existing agreements also must be approved by the FMC. By the rule of *Carnation Co., supra*, unapproved agreements are subject to the antitrust laws.

By its terms Section 15 is broad, requiring approval of "every agreement . . . or modification or cancellation thereof" which affects competition in the shipping industry. Courts, however, have realized that if read literally Section 15 could severely hamper the ability of shipping conferences to make even the most routine changes in rates or methods of operation; Section 15 has thus been construed conservatively so that agreements concerning routine operations relating to current rate changes have been held not to require separate approval. *Interpool Ltd.* v. *FMC*, 663 F.2d 142, 148 (D.C. Cir. 1980). In 1961 Congress implicitly adopted this construction of Section 15 by passage of, among other amendments, the tariff rate exception. *Id.*

Although rates and rate changes authorized by an approved conference agreement do not require separate approval by the FMC, they are by no means beyond review by that agency. As explained earlier, the FMC has been given numerous statutory tools to correct rates which violate any of the broad statutory standards rates must meet. Shippers injured by improper rates may recover reparations. "The scheme of regulation adopted thus permits the conference to continue operation but insures that their immunity from the antitrust laws will be subject to careful control." *Svenska Amerika Linien, supra*, at 243.

The Court is mindful of the rule that "[i]t is well settled that exemptions from the antitrust laws are to be narrowly construed." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440

U.S. 205, 231 (1979). This doctrine applies to express statutory exemptions such as that at issue here. *Id.*; *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973). Nevertheless, given the rather complete regulatory scheme of the Shipping Act, which both regulates the shipping industry and provides remedies (including reparations) for regulatory violations, given the history and policies behind the Shipping Act, and given the plain language of Section 15, it appears to this court that properly filed rates authorized by FMC-approved conference agreements are immune from the antitrust laws even if they are subsequently found to violate the Shipping Act.

Under Section 15, as stated earlier, agreements "lawful under this section . . . shall be excepted from [the antitrust laws]." The "lawfulness" of an agreement, as correctly argued by defendants, is only defined in the statute by whether or not the agreement has been approved by the FMC. Thus, "agreements . . . shall be lawful only when and as long as approved by the Commission. . ." It is beyond dispute that defendants' basic charter agreement has been approved by the FMC. Agreements as to particular rates, under the tariff rate exception, are allowed to take effect prior to specific FMC approval upon compliance with certain filing requirements. It is significant to note that this exception is to a clause providing that implementation of agreements before approval or after disapproval is *unlawful*. By implication, therefore, agreement to and implementation of properly filed rates is *lawful* within the meaning of Section 15's antitrust exemption.

It would appear, as defendants argue, that the protection of Section 15 would be flimsy indeed, and counter to Congress' stated intention of freeing the shipping industry from antitrust liability subject to regulatory control, if carriers and conferences could be authorized by the FMC to agree to tariff rates only to retroactively lose their protection every time particular rates are found violative of a substantive rate provision of the Act. The protection would be particularly flimsy since Congress was aware that determinations under Section 18(b)(5) are often close questions. *Federal Maritime Commission* v.

Caragher, 364 F.2d 709, 717 (2nd Cir. 1966). The effect of such a construction of Section 15 would be to force carriers to request approval of rates and rate changes prior to putting them into effect. Given the large number of conferences and much larger number of rates promulgated by each conference, such a task would surely swamp the FMC and lead to long delays in securing approvals. Moreover, "a conference that wished to adjust its rates to meet competition would be at a serious disadvantage if it were forced to wait for the Commission's approval before it acted." *Interpool Ltd., supra*, at 147. Neither the language of the Shipping Act, its legislative history nor case law suggest that such a narrow construction of Section 15 would be proper.

This court's construction of Section 15 is supported by the decisions in *Baton Rouge Marine Contractors* v. *Cargill, Inc.*, 1976-2 Trade Cases ¶ 61,212 (E.D. La. 1976), and in *Yellow Forwarding Co.* v. *Atlantic Container Line*, 498 F.Supp. 105 (E.D. Mo. 1980), *aff'd*, 668 F.2d 650 (8th Cir. 1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 2039 (1982). In both of these cases courts found that carrier actions, authorized by approved agreements, are insulated from antitrust scrutiny. The Court finds those decisions to be well-reasoned and persuasive, and will follow their holding.

PLAINTIFFS' OTHER CONTENTIONS

Plaintiffs raise several other minor arguments, only two of which need be addressed. First, plaintiffs note that defendants' agreement contains an anti-discrimination clause u der which defendants may not discriminate against one shipper vis-a-vis another shipper. Plaintiffs argue that since defendants' rates discriminatorily favor woodpulp and wood chip shippers over wastepaper shippers, those rates are beyond the scope of defendants' agreement and subject to the antitrust laws. The PWC charter agreement, however, merely repeats the Shipping Act's prohibition against discrimination. It would be anomalous to hold that defendants are exempt from application of the antitrust laws even if violation of the Shipping Act

could be established, and then to hold that defendants were so liable for writing into their agreement provisions of the Shipping Act that they were bound by anyway.

Plaintiffs also argue that certain of the defendants entered into individual long-term contracts to ship wood chips, and that since these contracts were not submitted to the FMC for approval and were not authorized by the PWC agreement, they are not immune from the antitrust laws. This may be so, but plaintiffs have failed to explain how these contracts violate Sections 1 and 2 of the Sherman Act.

CONCLUSION

Approved agreements and activities, including the setting of rates authorized by such agreements, are immunized from the antitrust laws regardless of whether those rates are later found to be violative of substantive provisions of the Shipping Act. Accordingly, plaintiffs' complaint fails to state a claim with respect to the wastepaper and woodpulp rates established by defendants and considered in prior administrative hearings. The complaint may, however, state a claim with respect to certain of the carrier's individual contracts to ship wood chips. With respect to those contracts, plaintiffs shall have thirty days to file an amended complaint setting forth more fully their theory of relief. The motion to dismiss is otherwise granted. In view of the Court's resolution of the motion to dismiss, plaintiffs' motion for summary judgment is denied and the motion of defendant East Asiatic Co., Ltd. for summary judgment is deemed moot at this time.

The Clerk of the court will serve copies of this Order by United States mail upon counsel of record for the parties.

Dated this 3 day of December, 1982.

/s/ Lawrence T. Lydick
LAWRENCE T. LYDICK
United States District Judge

PETITIONERS' COMPLAINT UNDER THE ANTITRUST LAWS IN THIS CASE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL ACTION NO.

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., as assignee of the claims and actions of its member BERG MILL SUPPLY CO., INC., CONSOLIDATED FIBRES, INC., PAPER FIBERS, INC., and SASSOON INTERNATIONAL CORPORATION, (successor to M. SASSOON & CO., INC.,), individually, and for and on behalf of themselves and a class consisting of all shippers of wastepaper from the West Coast of the United States and Canada to the Far East similarly situated,

Plaintiffs,

v.

AMERICAN MAIL LINE, LTD.; AMERICAN PRESIDENT LINES, LTD.; BARBER BLUE SEA LINE, formerly BARBER LINES, A/S; THE EAST ASIATIC CO., LTD., d/b/a EAC-KNUTSEN LINE; GALLEON SHIPPING CORPORATION; GLOBAL BULK TRANSPORT, INCORPORATED; ISTHMIAN LINES, INC., d/b/a STATES MARINE LINES; JAPAN LINES, LTD.; KAWASAKI KISEN KAISHA, LTD.; KOREA MARINE TRANSPORT CO., LTD.; A. P. MOLLER-MAERSK LINE; MARITIME COMPANY OF THE PHILIPPINES; MITSUI O.S.K. LINES, LTD.; NIPPON YUSEN KAISHA; OOCL-SEAPAC SERVICE-ORIENT OVERSEAS CONTAINER LINE, INC. (VOCC); PACIFIC FAR EAST LINE, INC.: PACIFIC WESTBOUND CONFERENCE; PENINSULAR-ORIENTAL STEAM NAVIGATION CO., d/b/a P & O ORIENT LINES; PHOENIX CONTAINER LINERS, LTD.; THE SCINDIA STEAM NAVIGATION CO., LTD.; SEA-LAND SERVICE, INC., SEA-TRAIN LINES, INC.; SEATRAIN INTERNATIONAL, S.A.; SHIPPING CORPORATION OF INDIA, LTD.; SHOWA LINE, LTD., formerly SHOWA SHIPPING CO., INC.; STATES MARINE INTERNATIONAL CO.; STATES STEAMSHIP CO.; TRANSPORTACION MARITIHA MEXICANA, S.A.; UNITED PHILIPPINE LINES; UNITED STATES LINES, INC.; YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.; WATERMAN STEAMSHIP CORPORATION; and ZIM ISRAEL NAVIGATION CO., LTD.,

Defendants.

Class Action Complaint For Treble Damages And Injunctive Relief Under The Antitrust Laws (15 U.S.C. §§ 1, 2, and 15 U.S.C. § 15)

DEMAND FOR JURY TRIAL

COMPLAINT FOR TREBLE DAMAGES AND INJUNCTIVE RELIEF UNDER THE ANTITRUST LAWS

Plaintiffs herein, complaining of defendants, respectfully allege:

PLAINTIFFS

1. Plaintiff National Association of Recycling Industries, Inc., hereinafter referred to as "NARI", is the trade association for the metals, paper, textile and rubber recycling industries of the United States. NARI, incorporated under and pursuant to the laws of the State of New York, maintains headquarters at 330 Madison Avenue in the City, County and State of New York, and its membership consists of firms located throughout the United States, all of which are engaged in the collection, processing and industrial utilization of, or foreign trade (export-import) in, recyclable or recycled metals, paper, textiles and rubber.

2. Plaintiff "NARI" brings this action against defendants under the antitrust laws as assignee of all claims and causes of action, legal and equitable, of its member Berg Mill Supply Co., Inc., a corporation duly organized under the laws of the State of California, with headquarters in Beverly Hills, California. NARI's assignor was and continues to be seriously injured in its business or property directly and solely by reason of defendants' illegal acts and violations of the federal antitrust laws hereinbelow alleged.

3. Plaintiff Consolidated Fibres, Inc., also a member of plaintiff NARI, is a corporation duly organized under and pursuant to the laws of the State of Delaware, with offices located in Los Angeles and San Francisco, California, and it too was and continues to be seriously injured in its business or property directly and solely by reason of defendants' illegal

acts and violations of the federal antitrust laws hereinbelow alleged.

4. Plaintiff Paper Fibers, Inc., likewise a member of Plaintiff NARI, is a corporation duly organized under and pursuant to the laws of the State of California, with offices located in Los Angeles, California, and it was and continues to be seriously injured in its business or property directly and solely by reason of defendants' illegal acts and violations of the federal antitrust laws hereinbelow alleged.

5. Plaintiff Sassoon International Corporation, formerly M. Sassoon & Co., Inc., also a member of plaintiff NARI, is a corporation duly organized under and pursuant to the laws of the State of California, with offices located in Los Angeles and Oakland, California, and it too was and continues to be seriously injured in its business or property directly and solely by reason of defendants' illegal acts and violations of the federal antitrust laws hereinbelow alleged.

6. Plaintiffs Consolidated Fibres, Inc., Paper Fibers, Inc. and Sassoon International Corporation bring this action against defendants individually, for and on behalf of themselves and a class consisting of all other members of plaintiff NARI and non-member firms similarly situated which, during any period of time covered by this complaint, exported or shipped recyclable or recycled wastepaper by water in foreign commerce from the West Coast of the United States and Canada to customers or markets in the Far East aboard any vessel operated by any of the defendant common carriers named in this complaint, and were required to pay rates or charges for such transportation fixed by defendant common carriers herein in combination or concert through defendant Pacific Westbound Conference.

DEFENDANTS

7. Defendant Pacific Westbound Conference, hereinafter referred to as "PWC", is a rate-fixing entity created and established by and pursuant to a contract or agreement executed

and modified from time to time by defendant carriers, which carriers are identified in paragraphs 8(i)-(xxviii), inclusive, of this complaint, the principal carriers by water serving the so-called "PWC trade", subject to the approval of the Federal Maritime Commission and specific statutory restrictions contained in Sections 15, 18 and other sections of the Shipping Act of 1916, as amended (46 U.S.C. 814, 817, *et al.*).

PWC's headquarters are located in the State of California and the so-called "PWC trade", in which competition is regulated and controlled by defendants' rate-fixing activities, dual rate contract arrangements and other actions complained of hereinbelow, encompasses traffic moving by ocean from ports along the Pacific Coast of the United States and Canada, including the Port of Los Angeles, California, to ports in Japan, Korea, Taiwan, Siberia, China, Hong Kong, Thailand, Indo-China and the Philippines.

8. Upon information and belief, during all or significant portions of the period of time covered by this complaint, each and all of the defendant common carriers by water named hereinbelow were parties to the basic PWC conference agreement, they were engaged in the "PWC trade"; they maintained offices, agents and representatives in the Central District of California; they transacted business in said district; they were members of PWC; they participated in concert in the illegal PWC rate-fixing activities and dual rate contract arrangements; and they charged and collected from plaintiff NARI's assignor, the other plaintiffs herein and each member of the class of shippers represented herein, the grossly illegal rates fixed by defendants in combination and complained of hereinbelow, all in violation of the federal antitrust laws and with resulting serious injury to the businesses and property of plaintiffs and each member of the class they represent before this Court. Said defendant carriers, listed alphabetically, are as follows:

(i) Defendant American Mail Line, Ltd., a limited company or corporation whose headquarters were located in Seat-

tle, Washington, and which, upon information and belief, was, during the period covered by this complaint, merged with or otherwise acquired by defendant American President Lines, Ltd.

(ii) Defendant American President Lines, Inc., a limited company or corporation whose headquarters are located in Oakland, California. This defendant is sued herein directly and in its own right, and also as a successor-in-interest to defendant American Mail Line, Ltd.

(iii) Defendant Barber Blue Sea Line, formerly known as Barber Lines, A/S, upon information and belief, a limited company or corporation whose headquarters are located in Oslo, Norway. This defendant is sued herein directly and in its own right, and also as successor-in-interest to Barber Lines, A/S.

(iv) Defendant The East Asiatic Co., Ltd., a limited company or corporation operating as the "EAC-Knutsen Line" and whose headquarters are located in Copenhagen, Denmark. Upon information and belief, during the period covered by this complaint, this defendant merged with or otherwise acquired the "Knutsen Line", which theretofore operated in the "PWC trade" and was, in its own name and right, a member of and full participant in the illegal rate-fixing activities of defendant PWC. This defendant is sued herein directly and in its own right, and also as the successor-in-interest to Knutsen Lines.

(v) Defendant Galleon Shipping Corporation, a corporation whose headquarters are located in Manila, Philippines.

(vi) Defendants Global Bulk Transport, Incorporated, Isthmian Lines, Inc. and States Marine International Corp., three separate corporations whose principal offices were located in New York, New York, and which operated jointly in the "PWC trade", and were thus jointly a member of defendant PWC under the name "States Marine Lines." The defendants are sued herein for their participation in the unlawful combination and conspiracy complained of hereinbelow by and through "States Marine Lines."

(vii) Defendant Japan Line, Ltd., a limited company or corporation whose headquarters are located in Tokyo, Japan.

(viii) Defendant Kawasaki Kisen Kaisha, Ltd., a limited company or corporation whose headquarters are located in Kobe, Japan, and which operates in the "PWC trade" as "K-Line."

(ix) Defendant Korea Marine Transport Co., Ltd., a limited company or corporation whose headquarters are located in Seoul, Korea.

(x) Defendant A. P. Moller-Maersk Line, a limited company which operates as a consortium or joint service consisting of Dampskibsselskabet AF 1912 Aktieselskab and Aktieselskabet Dampskibsselskabet Svenborg and whose headquarters are located in Copenhagen, Denmark. This defendant is sued herein directly and in its own right, and as agent or representative of all participants in the aforesaid consortium.

(xi) Defendant Maritime Company of the Philippines, a limited company or corporation whose headquarters are located in Tokyo, Japan.

(xii) Defendant Mitsui O.S.K. Lines, Ltd., a limited company or corporation whose headquarters are located in Tokyo, Japan, and which operates in the "PWC trade" under the name "NYK Line."

(xiii) Defendant Nippon Yusen Kaisha, a limited company or corporation whose headquarters are located in Tokyo, Japan, and which operates in the "PWC trade" under the name "NYK Line."

(xiv) Defendant Orient Overseas Container Line, Inc. (OOCC), a limited company or corporation operating under the name "OOCL-Seapac Service" and whose headquarters are located in Hong Kong.

(xv) Defendant Pacific Far East Line, Inc., a corporation whose headquarters were located in San Francisco, California, but which, upon information and belief, suspended its business operations during the period covered by this complaint.

(xvi) Defendant Peninsular and Steam Navigation Company, a limited company or corporation whose headquarters were located in London, England.

(xvii) Defendant Phoenix Container Lines, Ltd., a limited company or corporation whose headquarters were located in Hong Kong.

(xviii) Defendant The Scindia Steam Navigation Co., Ltd., a limited company or corporation whose headquarters were located in Bombay, India.

(xix) Defendant Sea-Land Service, Inc., a Delaware corporation whose headquarters are located in Edison, New Jersey.

(xx) Defendants Seatrain Lines, Inc. and Seatrain International, S.A., corporations whose headquarters were located in New York, New York, and Oakland, California, respectively. Upon information and belief, defendant Seatrain Lines, Inc. was, while it and/or its said subsidiary was a member of defendant PWC, a Delaware corporation, and defendant Seatrain International, S.A. was a Liberian corporation and a subsidiary of defendant Seatrain Lines, Inc.

(xxi) Defendant Shipping Corporation of India, Ltd., a limited company or corporation with headquarters in Bombay, India.

(xxii) Defendant Showa Line, Ltd., formerly Showa Shipping Co., Inc., a limited company or corporation whose headquarters are located in Japan.

(xxiii) Defendant States Steamship Company, a limited company or corporation whose headquarters were located in San Francisco, California, and which operated in the "PWC trade" and as a member of defendant PWC under the name "States Line."

(xxiv) Defendant Transportation Maritiha Mexicana, S.A., a limited company or corporation whose headquarters were located in Mexico.

(xxv) Defendant United Philippine Lines, a limited company or corporation whose headquarters were located in Manila, Philippines.

(xxvi) Defendant United States Lines, Inc., a Delaware corporation whose headquarters are located in New York, New York.

(xxvii) Defendant Yamashita-Shinnihon Steamship Co., Inc., a limited company or corporation whose headquarters are located in Tokyo, Japan, and which operates in the "PWC trade" and as a member of defendant PWC under the names "Y.S. Line" and/or "Yamashita-Shinnihon Line."

(xxviii) Defendant Waterman Steamship Corporation, a corporation whose headquarters are located in New York, New York.

(xxvix) Defendant Zim Israel Navigation Co., Ltd., a limited company or corporation whose headquarters are located in Haifa, Israel, and which operates in the "PWC trade" under the name "Zim Container Service."

9. Various other persons and other corporations, not named as defendants in this complaint, have participated as co-conspirators in the violations alleged herein and have performed acts, executed contracts and other documents and made statements in furtherance thereof.

JURISDICTION AND VENUE

10. This action is brought by plaintiff NARI, as assignee of its member identified hereinabove, and by plaintiffs Consolidated Fibres, Inc., Paper Fibers, Inc. and Sassoon International Corporation, successor to M. Sassoon & Co., Inc., individually and for and on behalf of the class of shippers described in Paragraph 6 hereinabove, under Section 4 of the Clayton Act (15 U.S.C. § 15) to recover threefold the damages sustained, interest and the costs of suit, including reasonable attorneys' fees, as allowed under the antitrust laws, against defendants, and each of them, for the injuries sustained by

plaintiffs and members of the class by reason of defendants' violations, as hereinafter alleged, of Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. 1, 2).

11. Jurisdiction of this Court is based on the provisions of Title 28 U.S.C. § 1337, entitled "Commerce and Antitrust Regulations", which states that "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. . . ." This Court also has jurisdiction over his action under the provisions of Title 28 U.S.C. § 1331, which grants district courts original jurisdiction of all civil actions arising under the laws of the United States.

12. Each of the defendants is found, transacts or does business, or has offices or an agent within the Central District of California. Many of the unlawful acts complained of hereinbelow occurred within the Central District of California, and much of the foreign and interstate trade or commerce described hereinbelow was and is conducted in, around and through the Port of Los Angeles. Venue as to defendants is thus properly in this district pursuant to the provisions of Title 15 U.S.C. §§ 15, 22 and Title 28 U.S.C. § 1391(b), (c) and (d).

CLASS ACTION ALLEGATIONS

13. As authorized and provided by Rule 23 of the Federal Rules of Civil Procedure, plaintiffs Consolidated Fibres, Inc., Paper Fibers, Inc. and Sassoon International Corporation sue herein for and on behalf of themselves and as representatives of the class described in Paragraph 6 hereinabove, of which class said plaintiffs, and each of them, are members.

14. The members of the class are so numerous that joinder of all members is impracticable. The claims of plaintiffs are typical of those of the class. Plaintiffs will fairly and adequately represent and protect the interests of the class. Except as to the amount of damages each member of the class has in-

dividually sustained, all other questions of law or fact are common to the class.

In addition, the prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; and here, the parties opposing the class have acted on grounds generally applicable to the class, thereby making appropriate final injunctive and monetary relief with respect to the class as a whole. Moreover, the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, so that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

TRADE AND COMMERCE

15. Recyclable wastepaper, processed woodpulp and virgin wood chips, exported and shipped from ports along the West Coast of the United States and Canada to the Far East, are competing raw material fiber resources which are technologically and economically interchangeable in the marketplaces of the Far East, and which are utilized by Far East manufacturers to produce competing paper and paper products.

16. Plaintiffs herein, as well as plaintiff NARI's asssignor and the class of exporters and shippers represented by plaintiffs, are engaged in the business of exporting and shipping recyclable wastepaper in interstate and foreign commerce from ports along the West Coast of the United States and Canada to markets in the Far East and to customers engaged in the production of paper and paper prducts in the Far East; and in the normal course of business, they regularly and necessarily compete in the Far East, both with wastepaper exporters and shippers from other nations and with large, in-

tegrated forest products companies that export and ship virgin wood chips and/or processed woodpulp from ports along the West Coast of the United States and Canada to the Far East.

17. During the period of time covered by this complaint, a cheap, abundant supply of recyclable wastepaper was consistently available in the United States and Canada for exportation and shipment from the West Coast of those two nations to the Far East to meet the huge, growing demand of several nations in the Far East for the aforesaid interchangeable raw material resources there required to manufacture paper and paper products.

However, while the prices of recyclable wastepaper on the West Coast of the United States and Canada were relatively low and thus very attractive and highly competitive for buyers in the Far East, ocean freight rates for the transportation of wastepaper from the West Coast of the United States and Canada to the Far East, fixed by defendant common carriers herein in concert and combination by or through defendant Pacific Westbound Conference, were simultaneously exceedingly high and unjustly discriminatory—and when those freight rates were included in the delivered prices of wastepaper offered for sale in the Far East, it was difficult and often impossible for plaintiffs, plaintiff NARI's assignor and the class of shippers represented by plaintiffs herein to compete, or to earn a fair, reasonable profit on sales they were able to make in the Far East.

18. Moreover, since during most of the period covered by this complaint, defendant common carriers herein and their rate-fixing association, defendant Pacific Westbound Conference, enjoyed effective monopoly control over the transportation of wastepaper from the West Coast of the United States and Canada to the Far East, plaintiffs, plaintiff NARI's assignor and the class of shippers represented by plaintiffs herein had little or no choice but to ship their wastepaper to the Far East on vessels operated by defendant common carriers and to pay the extremely high rates for such transportation fixed by

the monopoly through defendant Pacific Westbound Conference. In addition, in order to ship wastepaper at all aboard defendant carriers' vessels, plaintiffs, plaintiff NARI's assignor and the class of shippers represented herein had to comply with defendants' "dual rate system." The "dual rate system", with its contract and non-contract rate structure, had the effect of locking wastepaper shippers into utilizing transportation supplied by defendant carrier members of PWC. Generally, under the "dual rate system", a shipper must either agree to continue exclusively to patronize vessels operated by defendant carrier members of defendant PWC, in which case the shipper obtains the advantage of the "contract rate" uniformly offered by PWC members, or refuse to sign the exclusive use agreement and pay rates as much as 15% higher to ship his goods in the same "PWC trade" aboard vessels operated by defendant members of PWC.

Consequently, in 1971, for example, defendant carrier members of defendant PWC carried more than 89% of all wastepaper transported from the West Coast of the United States and Canada to the Far East, and in 1972 and 1973, PWC's members monopolized approximately 95% of all such wastepaper shipments.

As a result, during the period covered by this complaint, plaintiffs, plaintiff NARI's assignor and the class of wastepaper shippers represented herein were required by defendant carriers and their PWC monopoly to pay rates for the transportation of wastepaper to Japan which were *174%* to *268%* higher than the Pacific Coast price or value of the exported wastepaper. Similarly, on shipments to Korea, defendants exacted rates fixed by the PWC monopoly which exceeded the Pacific Coast price or value of the exported wastepaper by *201%* to *309%*. In such cases, purchasers of wastepaper in the Far East were paying mostly for *freight*, and plaintiffs, plaintiff NARI's assignor and the class of wastepaper shippers represented herein were severely injured both in their businesses and in their ability to compete in the Far East with sellers of wastepaper from other nations and sellers of virgin

wood chips and processed woodpulp from the United States and Canada.

19. Furthermore, while defendants were forcing plaintiffs, plaintiff NARI's assignor and the class of wastepaper shippers represented herein to pay the aforesaid extraordinarily high rates, fixed by defendant carriers in combination through the PWC monopoly, defendants were simultaneously acting, both individually and in concert, to favor competing the shippers of virgin wood chips and/or processed woodpulp with extraordinarily low rates, arrived at through free and open rate competition among defendant carriers. First, through defendant PWC, defendant carriers agreed to maintain "open rates" for shippers of woodpulp from the West Coast of the United States and Canada to the Far East. Thus, each defendant carrier member of PWC was permitted by PWC individually to fix its own rates for woodpulp shipments at any level, in free, open competition with all other carriers. Consequently, shippers of woodpulp (mostly, the large, integrated Pacific Coast forest products companies) were, during the period covered by this complaint, able to ship woodpulp from the Pacific Coast to Japan at rates charged by defendant carriers herein which amounted to only 10.7% to 22% of the Pacific Coast value of the exported woodpulp, with the result that competing U.S. woodpulp and wastepaper shippers on the West Coast of the United States paid the following charges or prices to ship identical 45,000 pound containers loaded with their competing commodities to Japan aboard vessels operated by defendants herein:

Wastepaper shippers	- $783.00
Woodpulp shippers	- $371.00

Similarly, competing shipments to Korea, made during the period covered by this complaint, resulted in the following freight charges to competing U.S. woodpulp and wastepaper shippers for transportation of identical, loaded 45,000 pound

containers, carried side-by-side aboard defendants' ships from the Pacific Coast to the same ports in Korea:

Wastepaper shippers	- $904.00
Woodpulp shippers	- $495.00

20. Concomitantly, defendant carriers herein, principally those with headquarters in Japan, favored competing shippers of virgin wood chips (again, the large, integrated Pacific Coast forest products companies) with even more beneficial rate arrangements discriminatorily arrived at through free and open competition among defendant carriers. During the period covered by this complaint, some or all of the defendant Japanese member lines of defendant PWC entered into individual long-term (10 years or more) contracts with competing shippers of virgin wood chips located on the Pacific Coast of the United States or Canada, pursuant to which those defendants agreed to carry wood chips from the Pacific Coast to the Far East for rates per ton far lower than even the lowest rate charged by any of the defendant carriers herein for the transportation of processed woodpulp. Thus, while plaintiffs and the class of wastepaper shippers they represent herein were forced to pay rates as high as $57.00 to $63.00 a ton to ship containerized wastepaper to Japan aboard defendants' vessels during part of the period covered by this complaint, competing containerized woodpulp shippers simultaneously paid only $32.00 a ton for the same transportation service, and competing virgin wood chip shippers paid only a fraction of the last-mentioned woodpulp rate per ton to move their commodity from the Pacific Coast to Japan, and upon informtion and belief, competing wood chips are still being transported by defendants in the "PWC trade" at the present time under and pursuant to these or similar long-term, low-rate contract arrangements. Consequently, during the period from 1968 to the present time, virgin wood chip shipments from the Pacific Coast to Japan, for example, grew steadily to the level of several million tons per year, while Japan imports only about 2% of its recyclable wastepaper requirements from the United States.

21. In addition, from time to time during the period covered by this complaint, defendants combined and conspired to fix unfair, unjustly discriminatory rates for selected shipments of wastepaper in the "PWC trade", solely for the purpose of protecting their monopoly position over wastepaper shipments generally and to restrain or prevent carriers who were not rate-fixing members of the PWC monopoly from effectively competing for such shipments in the "PWC trade." Thus, during certain periods, when plaintiffs and the class they represent herein were compelled by defendants to pay rates ranging from $31.25 to $55.80 a ton, depending on the measurements of wastepaper inside sealed containers, to ship their wastepaper in the "PWC trade", defendants simultaneously published tariffs pursuant to which defendants, or some of them, collected only $10.88 a ton to ship identical containerized wastepaper to Japan on a so-called "mini-land bridge" basis (combination rail-water traffic), and they charged only $20.00 a ton to ship identically containerized paper cubes (a compressed form of wastepaper) to Japan. Recently, in 1981, defendants established a temporary "special open rate" through the PWC monopoly of $28.00 a ton for containerized wastepaper shipments from the Pacific Coast to Taiwan, while they insisted on maintaining rates for identical containerized wastepaper shipments from the Pacific Coast to Japan and Korea at $49.00 a ton—a difference of $21.00 a ton—albeit the shipping distance from the Pacific Coast to Taiwan is approximately 1,500 miles longer than the shipping distance between the Pacific Coast and Japan and Korea.

PRIOR FEDERAL MARITIME COMMISSION INVESTIGATION OF DEFENDANTS' MONOPOLISTIC RATE-FIXING ACTIVITIES COMPLAINED OF HEREIN; FINAL JUDICIAL DECISION OF ILLEGALITY UNDER THE SHIPPING ACT

22. Defendants hold only a limited immunity from the antitrust laws for their combined, concerted rate-fixing activities in foreign or interstate commerce through defendant PWC. The Shipping Act of 1916, as amended (46 U.S.C. §§ 801, *et*

seq.), exempts rate-fixing activities which are *lawful* under that Act from the Sherman and Clayton Antitrust Acts (15 U.S.C. §§ 1, 2, 15, *et seq.*), but rate-fixing activities that are *not lawful* under the Shipping Act are *not* exempt from the Sherman and Clayton antitrust laws.

23. Under the Shipping Act of 1916, as amended, the Federal Maritime Commission, a regulatory agency of the United States Government, is charged with supervising and regulating defendants' combined rate-fixing activities under defendant PWC's conference agreement, and any activity found to be unjustly discriminatory or unfair as between U.S. shippers or exporters, or between exporters from the United States and their foreign competitors; or to operate to the detriment of the commerce of the United States; or to be contrary to the public interest; or to be in violation of any provision of the Shipping Act, is unlawful. In addition, Section 18(b)(5) of the Shipping Act (46 U.S.C. 817(b)(5)) states:

> "The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States."

24. Under Section 22(b) of the Shipping Act, as amended (46 U.S.C. 821(b)), the Federal Maritime Commission is authorized, upon its own motion, to investigate rate and rate-fixing violations of the Shipping Act. The Supreme Court of the United States, in turn, has ruled that rates fixed by a combination of carriers through a conference such as defendant PWC, are violative of the Sherman Antitrust Act only if they are first ruled unlawful under the Shipping Act. Accordingly, the Supreme Court has also decided that a private suit for treble damages and/or injunctive relief, which alleges that such rates or rate-fixing activities are violative of the antitrust laws, may not be maintained and must be suspended or dismissed until it has first been determined whether the challenged rates or rate-fixing activities are unlawful under the Shipping Act.

25. In this case, the Federal Maritime Commission, upon its own motion, commenced the necessary preliminary investigation under the Shipping Act into the lawfulness of defendants' wastepaper rates and concerted rate-fixing activities on or about July 20, 1972. The Commission's order of investigation charged that defendants' wastepaper rates and concerted rate actions through defendant PWC were possibly violative of Sections 15, 16, 17 and 18(b)(5) of the Shipping Act, and said order stated:

> "The Commission is aware of the many potential benefits to be derived from increased recycling of our national solid wastes through encouragement and development of existing and new ways and means for disposing of such waste. Wastepaper, for example, competes directly with virgin woodpulp both in the domestic and foreign trades and appears to be readily available for export from the United States at prices far lower than those charged for their virgin counterparts.
>
> "However, the Commission has reason to believe that the rates charged by members of the PWC for transportation of wastepaper may preclude wastepaper from being competitive with virgin woodpulp.
>
> "Rates on woodpulp are 'open,' allowing each Conference member to set rates at a level consistent with and based upon their individual operating expenses, while rates on wastepaper are fixed under the dual rate system. This permits exporters of woodpulp whose rates are 'open' to utilize the services of carriers having the lowest rates at the time of shipment, while exporters of wastepaper must exclusively use the Conference carriers at contract rates or refrain from signing the contract in order to use non-Conference carriers. . . .
>
> "It is . . . questionable whether [wastepaper] rates have been established with proper regard to cost, value and other ratemaking factors. . . ."

26. The investigation before the Federal Maritime Commission and subsequent judicial review of the Commission's actions therein continued from on or about July 20, 1972 to on or about March 24, 1981, when the decision of the United

States Court of Appeals for the District of Columbia Circuit in *National Association of Recycling Industries, Inc.* v. *Federal Maritime Commission, Sea-Land Service, Inc. and Pacific Westbound Conference*, 658 F.2d 816 (D.C. Cir. 1981), became final. The Court of Appeals affirmed a previous decision rendered by the Federal Maritime Commission's Administrative Law Judge, who conducted the actual investigation proceedings, and the Court of Appeals ruled:

> "In our examination of the record, . . . it appears inescapable that unreasonably high shipping rates for wastepaper set by the PWC monopoly detract from United States Commerce in violation of section 18(b)(5) of the [Shipping] Act." (658 F.2d 816, 825)

27. The Commission's Administrative Law Judge, whose decision was affirmed by the Court of Appeals as aforesaid, found that defendant carriers' wastepaper rates, established in concert through defendant PWC, were "so unreasonable as to be outrageously high"; that "wastepaper movement to the Far East has been hampered as a result of the exorbitant rates placed upon that commodity by PWC"; and that "PWC's wastepaper rates . . . have also caused a reduction of profit to wastepaper dealers." The Administrative Law Judge stated:

> "The loss of profit was a direct result of PWC's members becoming joint venturers participating in the yield from wastepaper sales to the Far East. . . . [I]t is abundantly clear that PWC intended its tariff rates to intrude upon the dealers' profit."

The Federal Maritime Commission's Administrative Law Judge thus declared:

> "With the foregoing discussion in mind, it is abundantly clear that in two separate but related respects, PWC's rate making practices, ostensibly under the protective umbrella of Agreement No. 57 [PWC's organic rate-fixing agreement] resulted in violation of Section 15.
>
> "First, in fixing wastepaper rates so unreasonably high as to be a detriment to commerce, PWC misused its conference agreement to contravene the regulatory purpose of section 18(b)(5). In employing its agreement so in-

juriously, PWC operated beyond the scope of the Commission's grant of partial immunity from the antitrust laws. The abusive use of the agreement operated to the detriment of the commerce of the United States and contrary to the public interest. . . .

"Second, PWC's rate making practices were unjustly unfair as between wastepaper and woodpulp shippers, exporters and importers in violation of an express provision of section 15 and in disregard of the specific terms of Article 2 of [PWC's] Agreement No. 57. These illegalities also operated to the detriment of the commerce of the United States and contrary to the public interest. . . ."

28. The Commission's Administrative Law Judge thus recommended the following prospective mandatory injunctive relief for plaintiffs and the class of wastepaper shippers before the Court in this case:

"The best course to follow is to require modification of PWC's conference agreement. Wastepaper shall be eliminated from PWC's rate fixing authority and wastepaper rates shall be declared open. Member lines shall file and observe reasonable and fair wastepaper rates. This will have the beneficial effect of restoring the forces of competition within the conference to the transportation of a commodity which has long endured unreasonably high and grossly unfair conference rates. . . . This method was utilized [by the Commission] in *Imposition of Surcharge by the Far East Conference at Searsport, Maine, supra.*"

29. Presently, more than four and one-half years after the Commission's Administrative Law Judge rendered the aforesaid decision and approximately eleven months after the Court of Appeals' aforesaid decision became final, plaintiffs and the class they represent herein are still without relief; defendants continue to violate the antitrust laws by fixing unlawful rates for the transportation of wastepaper in the "PWC trade" in concert through the PWC monopoly; those rates are still violative of Section 18(b)(5) of the Shipping Act of 1916, as amended; defendants, or some of them, still favor shippers of competing virgin wood chips, for example, with exceedingly low, discriminatory, long-term rates that amount to only a fraction of those plaintiffs and the class they represent

herein are required to pay to ship wastepaper to the Far East, and thus plaintiffs, plaintiff NARI's assignor and the class of shippers plaintiffs represent herein are continuing to suffer serious injury and damage to their respective businesses and property for which they now pray for relief in this action under the antitrust laws.

VIOLATIONS OF ANTITRUST LAWS ALLEGED AGAINST DEFENDANTS

30. During the period from in or about July, 1968 to the present time, defendants herein operated unlawfully under contracts or agreements by, between and among themselves and with other persons not named as defendants herein, and defendants engaged in a continuing combination and conspiracy in unreasonable restraint of the above-described interstate and foreign trade or commerce of the United States, in violation of Section 1 of the Sherman Antitrust Act, as amended (15 U.S.C. § 1).

31. During the period from in or about July, 1968 to the present time, defendants herein unlawfully combined or conspired with each other and with various other persons not named as defendants herein to monopolize or attempt to monopolize the above described interstate and foreign trade or commerce of the United States in violation of Section 2 of the Sherman Antitrust Act, as amended (15 U.S.C.§ 2).

32. More specifically, during the aforesaid period of time, defendants violated Sections 1 and 2 of the Sherman Antitrust Act by combining and conspiring with each other and/or with various other persons not named as defendants herein to do, and by doing in concert or combination the following things, among others, the purposes or effects of which were unreasonably to restrain the trade or commerce of the United States involved in, and/or to monopolize or attempt to monopolize, the transportation by water of recyclable or recycled wastepaper from the Pacific Coast of the United States and Canada to the Far East, and the sale and utilization of recycl-

able or recycled wastepaper from the United States by paper manufacturers in the Far East.

(a) Defendant carriers executed, became parties to and operated in concert and combination under defendant PWC's conference agreement, as modified from time to time during the period covered by this complaint;

(b) Defendant carriers also became members of defendant PWC, and contracted or agreed to assess and collect, and did assess and collect, rates and other charges for the transportation of wastepaper by each of them that were strictly in accordance with the uniform tariffs, rates and charges fixed, established, published and enforced by defendants in concert through defendant PWC;

(c) Defendant carriers thereupon continuously and repeatedly acted in concert and combination through defendant PWC to fix, establish, publish, enforce and collect rates and other charges for the transportation of recyclable and recycled wastepaper from the Pacific Coast of the United States and Canada to the Far East which, after statutory investigation under the Shipping Act, have now been ruled unreasonably high and unlawful under Section 18(b)(5) of the Shipping Act of 1916, as amended [46 U.S.C. 817(b)(5)], by both the Federal Maritime Commission's Administrative Law Judge in charge of the investigation, and by the United States Court of Appeals for the District of Columbia Circuit in *National Association of Recycling Industries, Inc., et al.* v. *Federal Maritime Commission, et al., supra*. In this regard, the Commission's Administrative Law Judge ruled, on the basis of the record before him in said investigation:

> "[I]n fixing wastepaper rates so unreasonably high as to be a detriment to commerce, PWC misused its conference agreement to contravene the regulatory purpose of section 18(b)(5). In employing its agreement so injuriously, PWC operated beyond the scope of the Commission's grant of partial immunity from the antitrust laws. The abusive use of the agreement operated to the detriment of

the commerce of the United States and contrary to the public interest."

(d) Defendants coupled the aforesaid unreasonably high, unlawful rates, uniformly charged in concert by all members of defendant PWC for the transportation of wastepaper in the "PWC trade," with strict combined enforcement of PWC's "dual rate system," under which U.S. wastepaper shippers were required by defendants either to agree to ship exclusively on vessels operated by PWC member lines or to pay additional freight charges ranging up to 15% for the privilege of shipping without an exclusive contract arrangement;

(e) Defendant carriers also acted in concert or combination through defendant PWC to "open" rates in the same "PWC trade" from the Pacific Coast of the United States and Canada to the Far East for shippers of processed woodpulp who regularly compete with shippers of recyclable and recycled wastepaper in the markets of the Far East, and during most of the period covered by this complaint, defendant carriers favored the competing woodpulp shippers with fully competitive rates, individually fixed far lower than those fixed and charged by defendants in concert for the transportation of wastepaper. In this regard, the Federal Maritime Commission's Administrative Law Judge ruled on the basis of the record developed during the aforesaid investigation under the Shipping Act:

> "PWC's rate making practices were unjustly unfair as between wastepaper and woodpulp shippers, exporters and importers in violation of an express provision of Section 15 [Shipping Act] and in disregard of the specific terms of Article 2 of [defendant PWC's] Agreement . . . These illegalities also operated to the detriment of the commerce of the United States and contrary to the public interest."

(f) While simultaneously and continuously acting in concert or combination with the other defendants herein to fix, enforce and collect unreasonably high, unlawful rates for the transportation of wastepaper in the "PWC trade," some of the defendant carriers herein such as defendant Japan Line, Ltd.,

operated outside the PWC rate-fixing monopoly to enter into individual, long-term contracts with virgin wood chip shippers located on the West Coast of the United States and Canada and who regularly compete with plaintiffs and the class of wastepaper shippers they represent herein in the Far East, whereby those competing wood chip shippers were granted extremely low, exceedingly discriminatory rates for the transportation of their competing commodity in the "PWC trade" for periods of time ranging up to ten years or longer, many of which contract rates are still in full force and effect today. In this regard, the Federal Maritime Commission's Administrative Law Judge found:

> "The lower grades of wastepaper, like old news, compete directly with woodchips, both of which are substitutes for groundwood pulp in papermaking. While woodchips are not carried by PWC members in conference service, tramp divisions of those members do carry woodchips at rates far below conference wastepaper and woodpulp rates. Although no market existed for woodchips before 1965, some 3,000,000 to 4,000,000 tons are now exported every year to the Far East. By contrast, although the Far East market for wastepaper preceded that of woodchips by years, old news now going to the Far East amounts to approximately 100,000 tons, an increase of only about 80,000 tons since 1967. . . . [T]hese facts do show that the Far East's demand for groundwood fiber has increased tremendously since 1966 and that old news is not participating proportionately to the detriment of wastepaper dealers."

(g) Moreover, from time to time, in order to preserve and protect defendants' monopoly position over shipments of wastepaper in the "PWC trade" to the maximum, as hereinabove alleged, defendants acted in concert or combination through defendant PWC periodically or temporarily to fix rates for selected containerized movements of wastepaper which were extremely unfair and discriminatory among competing shippers of wastepaper in the "PWC trade";

(h) Finally, during the period covered by this complaint, defendants acted in concert or combination to refuse to reduce

their unlawful, outrageously high rates for the transportation of wastepaper in the "PWC trade," and they have failed and refused to abandon their unlawful, concerted rate-fixing actions and activities even in response to the aforesaid decisions of the Federal Maritime Commission's Administrative Law Judge and the Court of Appeals.

EFFECTS

33. Defendants' unlawful combination and conspiracy in restraint of trade or commerce of the United States and defendants' combination or conspiracy to monopolize or attempt to monopolize such trade or commerce have had the following effects, among others:

(i) Rates for the transportation by water of recyclable or recycled wastepaper aboard defendants carriers' vessels in the "PWC trade" have continuously been uniformly fixed, maintained, enforced and collected at outrageously high, unreasonable levels found to be violative of Section 18(b)(5) of the Shipping Act by both the Federal Maritime Commission's Administrative Law Judge and the United States Court of Appeals for the District of Columbia Circuit after a thorough investigation under Section 22 of the Shipping Act;

(ii) Rate competition for the transportation of wastepaper in the "PWC trade" between and among defendant carriers, which together have, from time to time, monopolized and controlled as much as 95% of that traffic, has been restrained;

(iii) Plaintiff NARI's assignor, plaintiffs and members of the class of wastepaper shippers before the Court in this case have been deprived of the benefits of competition in the "PWC trade";

(iv) Competition in the Far East between plaintiff NARI's assignor, plaintiffs and the class of wastepaper shippers they represent herein and wastepaper shippers from foreign nations, on one hand, and competition between plaintiff NARI's assignor, plaintiffs and the class of wastepaper shippers they represent herein and shippers of processed woodpulp and vir-

gin wood chips from the Pacific Coast to the Far East, on the other, has likewise been restrained:

(v) From time to time, competition in the Far East between and among exporters and shippers of wastepaper from the United States has been restrained;

(vi) Defendant carriers have maintained effective monopoly control over extremely large percentages of the transportation of wastepaper in the "PWC trade," and they have utilized that monopoly position, beyond the scope of any exemption from the antitrust laws provided by the Shipping Act, to fix rates detrimental to the commerce of the United States and to the public interest in violation of the Shipping Act.

SUSPENSION OR TOLLING OF THE STATUTE OF LIMITATIONS

34. The running of any statute of limitations in this case has been suspended or tolled with respect to the claims and causes of action asserted herein by virtue of the provisions of Section 5(i) of the Clayton Act, as amended (15 U.S.C. § 16(i)), and/or by the doctrine repeatedly recognized by the Supreme Court of the United States whereby the statute of limitations is suspended or tolled on equitable grounds in circumstances such as those presented here.

35. As alleged hereinabove, the Federal Maritime Commission, an agency of the United States Government, instituted the required preliminary statutory investigation under the Shipping Act of defendants' wastepaper rates and combined rate-fixing activities in the "PWC trade" on or about July 20, 1972. That investigation led to a judgment of the United States Court of Appeals that defendants' wastepaper rates were unlawful under Section 18(b)(5) of the Shipping Act, and that judgment became final on March 24, 1981. The investigation docket is still pending before the Federal Maritime Commission, but in January, 1982, the Commission issued an order therein stating that no further administrative proceedings appear to be necessary.

36. As further alleged hereinabove, the Supreme Court of the United States has ruled that private suits for damages and/or injunctive relief under the antitrust laws against ocean carriers and their conferences with reference to their transportation rates and rate-fixing activities may not be maintained or prosecuted until after a finding by either the Federal Maritime Commission or a reviewing court that such rates and/or rate-fixing activities are unlawful under the Shipping Act.

37. The necessary finding of illegality under the Shipping Act having been established in this case, plaintiff NARI's assignor, plaintiffs and the class of wastepaper shippers they represent herein, now bring this action under the antitrust laws for injunctive relief and for damages sustained during the period from on or about July 20, 1968 to the present time, all applicable statutes of limitation having been tolled or suspended from and after July 20, 1972 when the Commission instituted the aforesaid investigation under the Shipping Act.

INJURY TO PLAINTIFFS AND MEMBERS OF THE CLASS

38. By reason of defendants' unlawful combination, conspiracy and monopolistic actions in violation of the Sherman Antitrust Act, plaintiff NARI's assignor, plaintiffs and the class of wastepaper shippers they represent herein have suffered injury and damage to their respective businesses and properties in the following respects, among others:

(i) Shipments of wastepaper in the "PWC trade" aboard vessels operated by defendant carriers were made by plaintiff NARI's assignor, plaintiffs and members of the class represented before this Court at unlawful rates and charges far higher than those that would have been paid in the absence of the illegal combination, conspiracy and monopoly;

(ii) Plaintiff NARI's assignor, plaintiffs and the members of the class suffered serious and substantial loss of profits on sales of wastepaper made in the Far East;

(iii) Plaintiff NARI's assignor, plaintiffs and the members of the class suffered serious and substantial loss of sales and

business in markets and to customers in the Far East, and their overall ability to sell and ship increased volumes of wastepaper in the Far East, and to compete in the Far East, was restricted, inhibited and restrained;

(iv) As found by the Federal Maritime Commission's Administrative Law Judge in the aforesaid investigation under the Shipping Act, plaintiff NARI's assignor, plaintiffs and the members of the class were actually constrained by the PWC monopoly to permit defendant carriers herein, in effect, to become "joint venturers participating in the yield from wastepaper sales to the Far East," while defendants simultaneously discriminated against plaintiffs and the members of the class by favoring their competitors, the shippers of processed woodpulp and virgin wood chips, with exceedingly low rates and charges, as well as long-term, low-rate contracts arrived at through free and open competition between and among defendant carriers.

39. As a result, plaintiff NARI's assignor, plaintiffs and each member of the class they seek to represent have sustained injury and loss to their businesses and property in amounts presently undetermined.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray:

A. That the Court determine that this action may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, and direct that reasonable notice of this action be given to all members of the class of wastepaper shippers represented by plaintiffs herein in the manner prescribed by Rule 23(c)(2) of the Federal Rules of Civil Procedure;

B. That the defendants' unlawful combination, concert and conspiracy alleged hereinabove be declared, adjudged and decreed to be an unreasonable restraint of interstate and foreign trade or commerce of the United States in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

C. That the defendants' unlawful monopoly, or attempt to monopolize, or combination or conspiracy between and among themselves and with other persons to monopolize the above-described interstate and foreign trade or commerce of the United States, be declared, adjudged and decreed to be in violation of Section 2 of the Sherman Antitrust Act (15 U.S.C. § 2);

D. That plaintiff NARI's assignor, plaintiffs and each and every member of the class represented by plaintiffs in this action recover threefold the damages determined to have been sustained by each of them by reason of defendants' unlawful actions, and that joint and several judgments in favor of plaintiff NARI's assignor, plaintiffs and each and every member of the class, respectively, be entered against the defendants, and each of them;

E. That all other orders, injunctions and judgments necessary be entered herein —

(i) to restrain and enjoin defendants, their officers, agents, attorneys and employees from continuing to combine and conspire under defendant PWC's conference agreement or any other contract or agreement to fix uniform rates or charges for the transportation by defendant carriers of wastepaper in the "PWC trade," wherever and however such rates or charges operate or tend to operate to restrain or monopolize trade or commerce of the United States in violation of Sections 1 or 2 of the Sherman Antitrust Act, or both, or which are otherwise unlawful; and

(ii) to require and direct defendants, as specifically authorized and provided by defendant PWC's own conference agreement, to "open" rates for the transportation of wastepaper by defendant carriers in the "PWC trade" so that the forces of competition may govern the fixing of such rates and charges in the future; and

(iii) to require and direct defendant carriers, and each of them, that, after wastepaper rates become "open" pursuant to this Court's order, each defendant carrier must promptly file with the Federal Maritime Commission, and thereafter continuously observe, charge, and collect, fair,

just, reasonable, non-discriminatory and lawful tariffs and rates for the transportation of wastepaper from the Pacific Coast to destinations in the Far East established through free and open competition among defendant carriers.

F. That each of the defendants, their successors, assignees, subsidiaries and transferees, and their respective officers, directors, agents and employees, and all other persons acting or claiming to act on behalf thereof or in concert therewith be perpetually enjoined or restrained from, in any manner, directly or indirectly, continuing, maintaining or renewing the aforesaid unlawful combination, conspiracy, agreement, understanding, concert, action or monopoly complained of hereinabove, or from adopting or following any course of action, agreement, practice, plan, program or design having a similar purpose or effect;

G. That this Court grant such other, further and additional relief as may be deemed just and proper; and

H. That plaintiff NARI's assignor, plaintiffs and the other members of the class represented by plaintiffs recover the costs of this suit, including interest and reasonable attorneys' fees, as provided by law.

DATED: February 23, 1982.

REAVIS & MCGRATH
RICHARD H. KEATINGE
MARSHALL G. MINTZ

EDWARD L. MERRIGAN

/s/ Marshall G. Mintz
MARSHALL G. MINTZ
Attorneys for Plaintiffs

Plaintiffs hereby demand trial by jury in this action.

DATED: February 23, 1982.

REAVIS & MCGRATH
RICHARD H. KEATINGE
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/s/ Marshall G. Mintz
MARSHALL G. MINTZ
Attorneys for Plaintiffs

EXCERPTS FROM THE FEDERAL MARITIME COMMISSION'S ADMINISTRATIVE LAW JUDGE'S DECISION IN *FMC DOCKET NO. 72-35, PACIFIC WESTBOUND CONFERENCE—WASTEPAPER AND WOODPULP FROM UNITED STATES WEST COAST TO FAR EAST,* WHICH WAS AFFIRMED BY THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IN *NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC. V. FEDERAL MARITIME COMMISSION, ET AL,* 658 F.2d 816, 829 (1980) — AND WHICH EXCERPTS ARE PARTICULARLY RELEVANT TO FACTUAL MATTERS CONTAINED IN THE PETITION FOR CERTIORARI

FEDERAL MARITIME COMMISSION

NO. 72-35

PACIFIC WESTBOUND CONFERENCE—WASTEPAPER AND WOODPULP FROM UNITED STATES WEST COAST TO FAR EAST

PWC is found to have engaged in ratemaking practices resulting in rates and charges on wastepaper which were so unreasonably high as to be detrimental to the commerce of the United States in contravention of section 18(b)(5).

PWC is found to have engaged in ratemaking practices which operated to the detriment of commerce and were unjustly unfair as between shippers, importers and exporters and contrary to the public interest in violation of section 15.

PWC's Agreement No. 57 is ordered and modified. As modified, wastepaper shall be eliminated from the conference's rate fixing authority and wastepaper rates shall be declared open. Member lines shall file and observe reasonable and fair wastepaper rates.

* * *

INITIAL DECISION OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE[1]*

By Order of Investigation, served July 20, 1972, the Commission instituted an investigation pursuant to sections 22, 15, 16, 17 and 18(b)(5) of the Shipping Act, 1916,[2] to determine whether the provisions of the Pacific Westbound Conference tariffs, and/or actions of its member lines pursuant thereto, related to the movement of wastepaper and woodpulp from United States West Coast ports to ports in Japan: (1) constitute unjust discrimination or unfair discrimination or unfair treatment as between carriers, shippers, or exporters or otherwise operate to the detriment of the commerce of the United States or are contrary to the public interest in violation of section 15 of the Act. (2) make or give an undue or unreason-

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*All irrelevant footnotes have been omitted.

able advantage to any particular person, locality or description of traffic in any respect whatsoever, or subject any particular person, locality or description of traffic to any undue prejudice or disadvantage in any respect whatsoever in violation of section 16, First. (3) result in charging or collecting rates or charges which are unjustly discriminatory between shippers contrary to section 17. (4) result in rates or charges so unreasonably high or low as to be detrimental to the commerce of the United States contrary to section 18(b)(5). The Commission further ordered that the investigation shall determine what action would best ameliorate the condition in the event the rates, practices, rules or regulations of the Pacific Westbound Conference or actions of its member lines pursuant thereto as they relate to the aforesaid shipments are found to violate provisions of the Shipping Act, 1916.

* * *

CHART II

COMPARISON OF WEST COAST DEALER PRICES AND PWC FREIGHT RATES TO SELECTED TYPES OF WASTEPAPER AND WOODPULP

Destination	Commodity	Value of Commodity Pacific Coast F.O.B. Dock (Per Official Board Market, as Adjusted	Ocean Freight Rate	Freight to Commodity Value Ratio	Carrier Revenue per 45,000 lb. Container
Japan Base Ports	Wastepaper: old corrugated containers	$ 20.00	$34.82	174%	$783.00
	Woodpulp: unbleached sulphate pulp	132.00	16.50	12.5%	371.00
	Wastepaper: old newspapers	13.00	34.82	268%	783.00
	Woodpulp: groundwood pulp	75.00	16.50	22%	371.00
	Wastepaper: hard white shavings	65.00	34.82	53.5%	783.00
	Woodpulp: bleached sulphate pulp	154.00	16.50	10.7%	371.00
Inchon, Korea	Wastepaper: old corrugated containers	20.00	40.18	201%	904.00
	Woodpulp: unbleached sulphate pulp	132.00	22.00	16.7%	495.00
	Wastepaper: old newspapers	13.00	40.18	309%	904.00
	Woodpulp: ground woodpulp	75.00	22.00	29.3%	495.00
	Wastepaper: hard white shavings	65.00	40.18	61.8%	904.00
	Woodpulp: bleached sulphate pulp	154.00	22.00	14.3%	495.00

The wastepaper freight rate to commodity price ratio, depicted above, was eased during the period from April 1973 to November 1974 despite increases in freight rates because of significant increases in the wholesale price of wastepaper. However, starting in December 1974 and continuing through the end of 1975 the wastepaper freight to commodity ratio soared even higher than the 1972 ratio because the wholesale price dipped to levels below those which prevailed in 1972. On the other hand, the woodpulp freight to commodity ratio remained about the same despite increases in the freight rates. The post-1972 ratios are demonstrated by the Rate History chart, *supra*, the following notations of rate changes, and the wholesale price index summaries which appear below the paragraph showing the rate changes.

The freight rates for wastepaper remained virtually unchanged from August 1974 through November 14, 1975. On July 15, 1975, the long ton rate to Japan Base ports for wastepaper shipments under 75 cf. per 2000 pounds was increased from $53.00 to $63.00, but that increase incorporated the then current $9.25 bunker surcharge plus an added $.75. On November 14, 1975, the rate was changed to $57.00. Also effective July 15, 1975, at least one PWC member filed a containerized woodpulp rate of $32.00, including bunker surcharge, per ton.[2]

* * *

3: VOLUME

Turning now to the volume of wastepaper movements via PWC vessels, it is noted that even in the face of the disproportionate freight to commodity ratio, volume generally increased and at times the increase was dramatic. The statistics for PWC wastepaper volume from 1967 through 1975 in short tons follow:

1967	58,239
1968	44,967
1969	60,666
1970	105,935

1971	97,514
1972	105,846
1973	264,153
1974	327,303
1975	294,370

Reference to other data is helpful in placing a perspective on those statistics. Forest products, such as woodpulp and woodchips, and recycled wastepaper are major raw material sources of fiber. Fiber is essential to the manufacture of paper products. Starting about 1973, there came into being a worldwide shortage of fiber which had a keen effect on Japan and Korea. Consequently in 1973, PWC carried 264,153 tons of wastepaper, of which 243,972 tons landed in Japan and Korea. The continued existence of the shortage is reflected by the volume of wastepaper shipped from Pacific Coast ports via PWC during 1974 despite increases in wastepaper dealer prices and increased ocean freight rates. (As will be seen later, woodpulp and woodchip volume remained high through 1974). In 1975, however, wastepaper volume declined from the 1974 level although dealer prices fell below the 1972 level and remained there for most of the year. Yet, as noted above, PWC made no downward rate adjustment in 1975 until November 14, 1975, a date approximately coinciding with the time when dealer prices regained the 1972 level.

The amount of woodpulp carried by PWC from 1967 through 1970 generally paralleled the wastepaper trend but in greater volume than wastepaper. During 1971 and 1972 there was near parity of movement. 1973 woodpulp movements nearly doubled 1972 volume but fell below wastepaper. A gradual decline in 1974 became precipitous in 1975. The tonnage for the entire period follows:

1967	203,165
1968	160,131
1969	191,728
1970	196,959
1971	98,972
1972	113,168

1973	205,556
1974	181,042
1975	79,689

The declining PWC woodpulp volume may be attributed in part to the effects of competition. For example, Japan and Korea, the predominant Far East consumers of woodpulp, imported 713,000 and 516,000[23] tons in 1974 and 1975, respectively. The precise extent to which wastepaper or woodchips (another source of fiber) volume may have affected woodpulp volume has not been shown on this record. However, it is clear that the increased reliance in Japan, particularly, and in Korea on woodchips has impacted heavily on woodpulp's declining volume. As shown by Dr. Brink, an expert witness sponsored by PWC, the market for woodchips was first established in 1965 and has grown steadily and spectacularly since. Woodchips, which compete directly with wastepaper and woodpulp, were carried by all of PWC's Japanese member lines under private non-conference contractual arrangements in specialized bulk carrying vessels until 1972. By 1972, those members carried 4,086,320 tons of woodchips. At the present time the record shows that at least one of those Japanese members, Japan Line, continues to carry woodchips under two private contractual arrangements entered into in 1971 and 1973, respectively, and running for a period of 10 years each. Under those contracts, Japan Line charters 2 vessels with cargo capacities of 25,000 and 32,000 tons to the purchaser of woodchips from a major American forest product supplier at continuing 10 year rates proportionately far below any per ton rate for woodpulp shown in the Rate History chart for 1971 or 1973.[24] Although the record does not show what percentage of

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[24] The specific details of Japan Lines' contracts were ordered to be treated confidential. I see no necessity to make more particularized reference to those contracts than I have stated in the text. Accordingly, NARI's motion to remove the contents of Exhibit 99 from the cloak of confidentiality, on which decision was reserved, is denied.

total woodchip exports from United States Pacific Coast ports was carried by PWC members after 1972, the record does show the volume of woodchips delivered to Japan from 1973 through 1975, and based upon past history and the private contracts and in the absence of any evidence to the contrary, it may be inferred that a substantial proportion was carried by PWC members, albeit outside the conference agreement. The ton volume statistics for woodchips (pulpwood in chip form) carried from the contiguous United States Pacific West Coast ports to Japan for those years were:

1973	3,422,233
1974	3,760,212
1975	3,045,622

* * *

In the case of wastepaper, PWC dominates the transportation market because frequency, regularity and dependability of container service is necessary to shippers of that commodity and only PWC can provide those elements. However, that is not the only reason. The dual rate system with its contract and non-contract rate structure has the effect of locking wastepaper shippers into PWC. Generally under the dual rate system a shipper must continue to exclusively patronize the conference in order to obtain the advantage of the contract rate offered by conference members, which rate may be as much as 15% below the non-contract rate applicable to shippers who do not sign exclusive patronage contracts. Thus, even though other liner services may occasionally offer a container rate below the PWC contract rate, contract wastepaper shippers may not avail themselves of the temporary rate advantage.

Nevertheless, a small amount of wastepaper does move by other liner service and by tramp, but even that amount is dwindling. In 1971, 95.6% of wastepaper went by liner and 4.4% by tramp. For the first 10 months of 1973, liners carried 99% of the wastepaper. In 1971, PWC carried 93.4% of liner

volume and 89.3% overall. In 1972, PWC's participation rose to 98.2% of liner volume and 95% of combined volume.

* * *

D: HARM

It is economic axiom that all things being equal more cargo will move at lower rates, but this truism, standing alone, is not sufficient to warrant a finding that PWC's rates caused harm or mischief to wastepaper shippers. However, the record does show convincingly that wastepaper movement to the Far East has been hampered as a result of the exorbitant rates placed upon that commodity by PWC despite the increase in the volume of wastepaper moving to Far East destinations since 1971.

As seen, Consolidated Fibres' president has traveled to Japan, Taiwan and the Philippines to visit manufacturers in those countries who produce products made from woodpulp and wastepaper. He went to their mills, observed their operations and reviewed the economics which have prevented them from ordering increased quantities of wastepaper they need and want to replace their utilization of pulp. Those manufacturers would use ever increasing quantities of wastepaper generated in the United States if the delivered price in those countries were lower.

PWC views the testimony of the Consolidated Fibres' witness as hearsay, self-serving and therefore unreliable. The testimony may be hearsay in part but it is not unreliable. PWC has not countered the evidence with any witness of its own from the Far East to show that it is not true. Indeed, as also seen, PWC's own records confirm the truth of the evidence given by Consolidated Fibres' president. Wastepaper receivers in the Far East have requested PWC in writing to reduce the freight rate because the delivered price had gone so high that the receivers would have to shift to woodpulp unless PWC were to afford some price relief.

There is other evidence that wastepaper movement has been adversely affected by PWC's pricing policies.

Historically, the price of domestically produced wastepaper in Far East countries have been two to two and one-half times higher than that of wastepaper on the West Coast of the United States. This is obviously an initial disadvantage to West Coast wastepaper dealers desiring to compete in the foreign markets. Yet, they are able to sell their products in those markets because of the short supply of fiber and because American wastepaper has the advantage of a lower West Coast price than the primary source of fiber. However, the origin price inducement to purchase American wastepaper rather than using other sources of fibre is diminished because of the chilling effect PWC's rates have on the delivered price of wastepaper.

PWC suggests that the wastepaper dealer's remedy is to reduce the price of his product on the West Coast rather than causing PWC to reduce its rates. This is preposterous. The evidence clearly shows that for most of the times covered by this proceeding, about two-thirds of the delivered prices of wastepaper in the Far East consisted of ocean freight charges. Even if the West Coast sales price of wastepaper were lowered the effect on the delivered price would be slight.

Moreover, the West Coast dealer price for export could not be lowered. There is an established market for wastepaper on the West Coast and, while the price may fluctuate, wastepaper for export is sold at the same price as wastepaper intended for domestic consumption.

While there is no evidence of the wastepaper dealer's cost or profit in the collection and sale of that commodity,[80] the record shows that the volume of American wastepaper retrieved in the collection process increases as the market price of that commodity increases. In other words, the higher the dealer's market price, the greater is the incentive to the individual collector at the bottom of the pyramid. Theoretically, if the ocean freight costs were lower, the Far East receivers would order more wastepaper, the dealer could allocate more funds for collection, and spurred on by the financial reward, individ-

ual collectors would be induced to greater collection endeavor. In the case of wastepaper, experience shows that theory becomes fact, for historically a greater percentage of wastepaper is retrieved for further use in the recycling process during periods of enhanced incentive to the individual collector in the United States. By maintaining the exorbitant ocean freight rates thus allowing no leeway for collection incentive, PWC has not only inhibited the flow of wastepaper to the Far East, it has, in effect, insinuated its members into participation as joint venturers with wastepaper dealers in the marketing of that commodity in the Far East.

I find that PWC's wastepaper rates have not only adversely affected the volume of wastepaper movement, they have also caused a reduction of profit to wastepaper dealers.

It is misleading to point to the increase in the volume of wastepaper movement as proof that the PWC rates do not interfere with wastepaper shipments or harm wastepaper dealers. The lower grades of wastepaper, like old news, compete directly with woodchips, both of which are substitutes for groundwood pulp in papermaking. While woodchips are not carried by PWC members in conference service, tramp divisions of those members do carry woodchips at rates far below conference wastepaper and woodpulp rates. Although, no market existed for the woodchips before 1965, some 3,000,000 to 4,000,000 tons are now exported every year to the Far East. By contrast, although the Far East market for wastepaper preceded that of woodchips by years, old news now going to the Far East amounts to approximately 100,000 tons, an increase of only about 80,000 tons since 1967.[51] The disparity in performance of these two nearly identical fiber resources diminishes the probative value of wastepaper's increasing volume as proof showing PWC's wastepaper rates are not unreasonably high. On the other hand these facts do show that the Far East's demand for goundwood fiber has increased tremendously since 1966 and that old news is not participating proportionately to the detriment of wastepaper dealers.

* * *

NARI has met both elements of its burden of proof. It has produced evidence demonstrating that the wastepaper rates are unreasonably high and detrimental to commerce. The evidence it produced is clear and convincing. On the other hand, PWC has failed to produce satisfactory evidence that its wastepaper rates are reasonable.[103] In weighing all the evidence, I find that NARI has sustained its burden of persuasion with clear and convincing proof that PWC wastepaper rates are so unreasonably high as to be detrimental to the commerce of the United States.

* * *

A comparison of West Coast dealer prices for selected types of wastepaper and woodpulp at the outset of the investigation shows that the wastepaper values were only about 15% to 42% of the comparative types of woodpulp, yet the lower valued commodities took rates which were 167 to 200% higher than the higher valued commodity. In addition, at the time the freight to commodity value ratio ranged from a low of 10.7% to a high of only 29.3% for each of the selected grades of woodpulp. These relationships remained substantially the same through most of the period covered by the investigation.

Based on the foregoing considerations, the wastepaper rates were so unreasonable as to be outrageously high.

* * *

The findings of fact detail the manifest harm suffered by wastepaper dealers as a result of PWC's rates on that commodity. In sum, the facts establish that wastepaper movement was inhibited[129] and the dealers suffered a loss of profit.

* * *

The loss of profit was a direct result of PWC's members becoming joint venturers participating in the yield from wastepaper sales to the Far East.

Although the damaging effect of absorbing a shipper's profit may be less tangible, it was long ago established in the law that

common carriers have no right to share in the profits of shippers, no matter how profitable the shippers' business may be. *Tift* v. *Southern Ry. Co.*, 10 I.C.C. 548 (1905), aff'd 138 F. 753, 767 (W.D. Ga. 1905), aff'd sub nom. *Southern Ry. Co.* v. *Tift*, 206 U.S. 428 (1907); *Central Yellow Pine Asso.* v. *Illinois C. R. Co.*, 10 I.C.C. 505 (1905), aff'd ___ F. ___ (E.D. La.) (no opinion was filed), aff'd sub nom. *Illinois C. & RR* v. *I.C.C.*, 206 U.S. 441 (1907).

* * *

In the matter under consideration here, the facts, while different, are not dissimilar, in their impact, to those in the lumber rate cases. PWC's members were realizing a profit on the transportation of woodpulp.[131] Whatever the woodpulp profit might be, the profit on wastepaper was exceedingly greater because the wastepaper rate was double that of woodpulp and the cost of carriage of wastepaper was not greater than that of woodpulp.

The record does not disclose what the wastepaper dealers' profits were or whether a profit was earned at all on sales to the Far East at all times at the rates which appeared in PWC's tariff. Nevertheless, it is abundantly clear that PWC intended its tariff rates to intrude upon the dealers' profit. This is manifest from its suggestion that the dealers reduce their price despite the fact that 72% of the landed cost in Japan was the cost of ocean freight.

* * *

E: ULTIMATE CONCLUSIONS

PWC is found to have engaged in ratemaking practices resulting in rates and charges on wastepaper which were so unreasonably high as to be detrimental to the commerce of the United States in contravention of section 18(b)(5).

PWC is found to have engaged in ratemaking practices which operated to the detriment of commerce and were unjustly unfair as between shippers, importers and exporters and contrary to the public interest in violation of section 15.

PWC's Agreement No. 57 is ordered modified. As modified, wastepaper shall be eliminated from the conference's rate fixing authority and wastepaper rates shall be declared open. Member lines shall file and observe reasonable and fair wastepaper rates.

/s/ Seymour Glanzer
SEYMOUR GLANZER
Administrative Law Judge

Washington, D.C.
August 15, 1977

EXCERPTS FROM AFFIDAVIT OF DONOVAN D. DAY, JR., CHAIRMAN, PACIFIC WESTBOUND CONFERENCE, WHICH ARE RELEVANT TO FACTUAL MATTERS REFERRED TO IN THE PETITION FOR CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. 82 0895 LTL (Kx)

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC. *et al.*,

Plaintiffs,

vs.

AMERICAN MAIL LINE, LTD., *et al.*,

Defendants.

AFFIDAVIT OF DONOVAN D. DAY, JR., IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' SUMMARY JUDGEMENT MOTION

DONOVAN D. DAY, JR., first being duly sworn, deposes and says:

1. I am the Chairman of the Pacific Westbound Confeence ("PWC"). I have held this position continuously since January 1, 1972.

2. In accordance with the tariff filing requirements of the Shipping Act, 1916, the PWC publishes its rates and charges in tariffs on file with the Federal Maritime Commission ("FMC"). For some commodities, the PWC files "open minimum rates." Such a designation means that the conference member lines may charge at or above the minimum rate. The individual member lines file their rates on these open-rated commodities with the FMC in the open rate appendix accompanying the applicable PWC tariff item.

3. The published tariffs currently in effect for woodpulp (attached hereto as Exhibit A) and wastepaper (attached hereto as Exhibit B) can be summarized as follows (rates are in U.S.

dollars per metric ton (KT); density requirements are expressed cubic meters (M^3) per KT):*

	TO JAPAN	TO TAIWAN	TO KOREA
WOODPULP, NOT EXCEEDING 1.56 M3/KT	OPEN MIN. $59.00	OPEN MIN. $67.00	OPEN MIN. $67.00
WASTE-PAPER, SUBJECT TO WEIGHT MINIMUMS	$65.00	OPEN MIN. $39.00	$66.00

* * *

/s/ Donovan D. Day, Jr.
DONOVAN D. DAY, JR.

CITY AND COUNTY OF SAN FRANCISCO
STATE OF CALIFORNIA

SUBSCRIBED AND SWORN TO BEFORE me this 13th day of July, 1982.

/s/ Margaret E. Smyth
MARGARET E. SMYTH
NOTARY PUBLIC

[NOTORIAL SEAL]

My commission expires: June 20, 1983

*These excerpts do not include Mr. Day's 1982 rate quotations for competing shipments to Manila, Hong Kong and Bangkok.

RELEVANT EXCERPTS FROM BASIC OPERATING AGREEMENT OF RESPONDENT PACIFIC WESTBOUND CONFERENCE, AS APPROVED BY THE FEDERAL MARITIME COMMISSION UNDER SECTION 15 OF THE SHIPPING ACT OF 1916, AS AMENDED, 46 U.S.C. 814

PACIFIC WESTBOUND CONFERENCE

FEDERAL MARITIME COMMISSION

AGREEMENT NO. 57

As Amended and Approved through July 27, 1977

MEMORANDUM COPY

This MEMORANDUM OF AGREEMENT, made in the City of Vancouver, by and between the Parties signatory hereto, on the 8th day of January, in the year one thousand nine hundred and twenty-three (1923).

WITNESSETH

That the parties hereby associate themselves together in a Pacific Westbound Conference to promote commerce from or via the Pacific Coast Ports or points in United States and Canada to Ports or points in Japan, Korea, Taiwan (Formosa), Siberia, Manchuria, China, Hong Kong, Indo-China, Thailand, and the Republic of the Philippines unless prohibited by any Government regulatory body (it being understood that such commerce shall include all cargo, except as may be otherwise provided in the Tariffs, that may be shipped westbound via the Pacific Ocean, from or via the said Pacific Ports to the said countries or from any overland or other points in the United States or Canada via said Pacific Ports), and for the common good of shippers and carriers, by providing just and economical co-operation between the steamship lines operating in such trade. And to the accomplishment of that end the parties hereby severally agree with other as follows:

It is understood that this agreement is for the regulation of traffic and not of operation and only covers direct or transhipment rates, division of through rates, tariffs, brokerage and matters directly relating thereto.

ARTICLE 1

(a) All freight or other charges for transportation of cargo between the aforementioned ports or points shall be charged

and collected by the parties hereto, strictly in accordance with the Tariffs of rates and charges including tariffs of joint or other through rates and rules and regulations applicable thereto agreed to by the parties and not prohibited by any Government regulatory body; except that the ocean rate, or ocean portion of any joint or other through rate, on any commodity may be declared "OPEN" and subsequently closed by a two-thirds vote of regular members entitled to vote. Commodities on which rates have been declared "OPEN" and the extent to which the Conference relinquishes control over the booking and transportation thereof will be shown in Conference Tariffs.

* * *

ARTICLE 2

There shall be no undue preference or advantage nor unreasonable discrimination nor unfair practice against any consignor or consignee by any of the parties hereto.

ARTICLE 3

There shall be no payment or refund in respect of freight or compensation received and no absorption at loading or discharging ports of rail or coastal steamer freights or other charges, directly, or indirectly, by any of the parties hereto, except as may be agreed to by two-thirds of parties herein at any regular meeting of the Conference.

* * *

ARTICLE 5

The parties hereto shall meet together in Conference, not less than two times annually, at a time and place to be agreed upon. These meetings shall be presided over by a Chairman, or in his absence, a Vice Chairman, elected by the parties hereto, who shall also designate a Secretary to perform such duties as pertain to that office.

ARTICLE 6

The parties hereto shall abide and be governed by the Rules and Regulations contained in Appendix, attached hereto and made a part hereof, which may be amended by a two-thirds vote of those entitled to vote, except as otherwise specifically provided. No such amendment shall be carried into effect until it has been approved pursuant to Section 15 of the Shipping Act, 1916, as amended.

ARTICLE 7

The parties hereto shall consider and pass upon any matter involving discriminations, tariffs, freight, brokerage or other charges, or the regulation of westbound cargo between the aforementioned ports at any meeting of the Conference, provided that notice in writing has been given in accordance with the Rules and Regulations. If all of the parties hereto are present at any meeting, action may be taken on any matter within the scope of this agreement without prior notice thereof. Any such matter or thing brought before the meeting in the manner aforesaid and agreed to by two-thirds of the parties hereto, shall thereby become an agreement binding upon all the parties hereto, with the same force and effect as if expressly made a part of this agreement, except as otherwise provided in the Rules and Regulations of this Conference. Reference in this agreement to voting by all or a specific number of the members means only those members who are entitled to vote.

ARTICLE 8

Standing committees of designated representatives of the parties hereto may be appointed, which committees shall consider and recommend for adoption and agreement by the parties hereto schedules of tariff freight rates and charges to be charged and collected for the transportation of merchandise between any of the aforementioned ports, brokerage and any other matters within the scope of this agreement; and, provided that notice of the matter to be considered at any meeting has been given to the parties hereto by the Secretary, as

provided in Article 7 hereof, the parties hereto agree and stipulate with each other that they will be bound by the Agreement of two-thirds of their number, except as otherwise provided in the Rules and Regulations of this Conference, as to any tariff, freight rate, charge, brokerage, traffic regulation and/or any other matter within the scope of this agreement with the same force and effect as if expressly made a part hereof.

ARTICLE 9

Each member party to this agreement shall be entitled to a single vote in all matters to be decided by the vote of the general Conference, except that any member whose sailings have been discontinued for a period of three (3) calendar months, of which fact the member must notify the Secretary in writing, shall not be entitled to vote on rates, and any member whose sailings have been discontinued for a period of twelve (12) calendar months, of which fact the member must notify the Secretary in writing, shall not be entitled to vote on any Conference matter, including modification or cancellation of this Agreement. Upon resumption of sailing such a member shall again enjoy full voting privileges.

Notice of loss or restoration of voting rights shall be furnished promptly to the governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended.

* * *

ARTICLE 16

The expenses of maintaining and carrying on the Conference shall be borne as determined by the members.

ARTICLE 17

Any Party to this agreement may be eliminated therefrom by a vote of two-thirds of The Parties hereto entitled to vote, for failure to maintain a common carrier service or for failure to abide by all the terms and conditions of this agreement. Viola-

tion of any of the provisions of this agreement or any of the rules and regulations adopted pursuant thereto, or failure to permit examinations of books, records, accounts and documents by the Chairman or by the Neutral Body, or the refusal within 10 days after written demand therefor by the Chairman to participate in any arbitration held pursuant to the provisions of Articles 12 or 13 hereof or to abide by the decision of the Neutral Body or of any such arbitration and the omission of Any Party to replenish the security deposited under Article 10 hereof when the same shall have been depleted by resort thereto for the payment of Decided Liabilities shall constitute grounds for such elimination whether or not resort is had to any other procedures provided in this agreement.

* * *

ARTICLE 24

The parties hereto, shall agree upon Rules and Regulations which may be changed or added to at any meeting by a two-thirds vote of the parties hereto entitled to a vote.

ARTICLE 25

When a subject is placed before the Conference for consideration, no member shall divulge to any person, firm or corporation not a party hereto whether or not it is in favor of the proposal and after the matter has been acted on by the Conference, no Member shall divulge to any such person other than a party hereto how it or any other Member voted on a matter nor at any time divulge to a nonmember any information as to views expressed or positions taken by it or any other Member with respect to any matter which is or has been before the Conference whether Conference or Committee meetings or through correspondence, bulletins, memoranda or otherwise.

Each Member is bound in honor and has agreed to consider and maintain all questions and actions that may be considered or adopted in meetings or in correspondence in connection therewith as secret and confidential. All publicity concerning

Conference affairs, proceedings and discussions will be disseminated only through the Chairman.

Each party hereto has a duty to report to the Chairman any information as to a violation of this Article. The Chairman shall investigate any information indicating a possible violation and has the authority to employ outside assistance at Conference expense to assist in such investigation. Violations of this Article shall be dealt with in accordance with Article 13.

No provision in this Agreement shall be considered as a prohibition against a Member Line furnishing information requested by the governmental agency charged with the administration of Shipping Act, 1916, as amended.

* * *

ARTICLE 28

This Agreement may be executed in several parts, and the said parts shall read and be effectual as one instrument. Each of the parties hereto hereby expressly authorizes the Chairman to sign on its behalf and to file for approval with the agency charged with administering the Shipping Act, 1916, as amended, any amendments to this agreement and to the appendix to this agreement (Rules and Regulations) which have been duly adopted by the Conference by the vote and the procedures prescribed by this agreement or by the appendix to this agreement, respectively. Subsequent to the date of this agreement, any person, by the act of becoming a party to this agreement, shall thereby authorize the Chairman to sign and file amendments on its behalf as provided hereinabove.

ARTICLE 29

This Agreement may be executed in several parts, and the said parts shall read and be effectual as one instrument.

American President Lines Ltd.
(American Mail Line)

The East Asiatic Company Limited

Galleon Shipping Company

Japan Line, Ltd.

Kawasaki Kisen Kaisha, Ltd.

KNUTSEN LINE
Dampskibsaktiesclskapet Jeannette Skinner
Skibsaktieselskapet Pacific
Skibsaktieselskapet Marie Bakke
Dampskibsaktieselskapet Golden Gate
Dampskibsaktieselskapet Lisbeth
Skibsaktieselskapet Ogeka
Hvalfangstaktieselskapet Svderoy

A. P. Koller, Maersk Line

Dampskisselskafet AF 1912 Aktidselskaf

Aktieselsklbet Dampskisselskabet Svendeors

Maritime Company of the Philippines

Nippon Yusen Kaisha (N.Y.K. Line)

Okakshosen Mitsuisenpaku Kaisha Ltd.
(Kitsui O.S.K. Lines, Ltd.)

Phoenix Container Liners (1976) Ltd.

Sea-Land Service, Inc.

Seatrain International S.A.

Showa Line Ltd.

States Steamship Company

United States Lines

Yamashita-Shinnihon Steamship Co., Ltd.
(Zim Container Service Division)
(Zim American Israel Shipping Co., Inc. General Agents)

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STATUTORY ADDENDUM—RELEVANT PARTS OF SHERMAN AND CLAYTON ANTITRUST ACTS AND SHIPPING ACT APPLICABLE TO THIS CASE

STATUTORY ADDENDUM

RELEVANT PARTS OF STATUTES INVOLVED IN THIS CASE

1. The Sherman Antitrust Act, § 1, 15 U.S.C. § 1, as amended:

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.

2. The Sherman Antitrust Act, § 2, 15 U.S.C. § 2, as amended:

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708.

3. The Clayton Antitrust Act, § 4, 15 U.S.C. § 15, as amended:

§ 15. Suits by persons injured; amount of recovery; prejudgment interest

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying litigation or increasing the cost thereof.

As amended Sept. 12, 1980, Pub.L. 96-349, § 4(a)(1), 94 Stat. 1156.

4. The Shipping Act of 1916, § 15, 46 U.S.C. § 814, as amended:

> § 814. Contracts between carriers filed with Commission; definition of "agreement"; approval, disapproval, etc., by Commission; unlawful execution of agreements; conference agreements; assessment agreements; antitrust laws exemptions; civil action for penalties; terminal leases exemption
>
> Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight of passenger or traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements, but does not include maritime labor agreements or any provisions of such agreements, unless such provisions provide for an assessment agreement described in the fifth paragraph of this section.
>
> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or, between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the

same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1 to 11 and 15 of Title 15, and amendments and Acts supplementary thereto.

5. The Shipping Act of 1916, § 18(b)(5), 46 U.S.C. 817(b)(5), as amended:

> (5) The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

No. 83-1200

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., *et al.*,
Petitioners,

vs.

AMERICAN MAIL LINE, LTD., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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Moller-Maersk Line
Mitsui O.S.K. Lines, Ltd.
Nippon Yusen Kaisha
Orient Overseas Container Line, Inc. (VOCC)
Pacific Westbound Conference
Sea-Land Service, Inc.
Showa Line, Ltd.
Transportation Maritime Mexicana, S.A.
United Philippine Lines
United States Lines, Inc.
Yamashita-Shinnihon Steamship Co., Ltd.
Zim Israel Navigation Co., Ltd.

(continued on inside front cover)

February 23, 1984

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QUESTIONS PRESENTED

1. May a shipping conference ratemaking agreement approved by the Federal Maritime Commission, and therefore exempted from the antitrust laws under section 15 of the Shipping Act, be deprived retroactively of this exemption if rates set under the agreement are later found to fall short of the broad normative rate criteria contained elsewhere in the Act?

2. Did the courts below act within the bounds of the accepted and usual course of judicial proceedings by holding that a cause of action under the antitrust laws is not established by the mere absence of antitrust immunity for contracts — where the complaint concedes (even after opportunity to amend) that these contracts were between individual defendant carriers and individual shippers of woodchips and the product of "free and open competition"?

3. Does the decision below conflict with the decision of any other circuit?[1]

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[1]In response to Rule 28.1, the following respondents and related companies have an interest in the outcome of this case: Respondent AMERICAN MAIL LINE, LTD.; respondent AMERICAN PRESIDENT LINES, LTD., American President Transportation Companies, Ltd., American President Companies, Ltd.; respondent BARBER BLUE SEA LINE A/S, Barber Lines A/S, Wilh. Wilhemsen, Blue Funnel Line, Ocean Transport & Trading, P.L.C., China Mutual Steam Navigation Co., Ltd., Swedish East Asia Line, Bronstrom Shipping Co., Ltd.; respondent THE EAST ASIATIC COMPANY, LTD. A/S; respondent GALLEON SHIPPING CORPORATION; respondent GLOBAL BULK TRANSPORT, Mercer Associates, Inc.; respondents ISTHMIAN LINES, INC. and STATES MARINE INTERNATIONAL, Isco, Inc.; respondent JAPAN LINE, LTD.; respondent KAWASAKI KISEN KAISHA, LTD.; respondent KOREA MARINE TRANSPORT CO., LTD.; respondent MARITIME COMPANY OF THE PHILIPPINES; respondent MOLLER-MAERSK

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No. 83-1200

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

Petitioners brought an antitrust action against a shipping conference and its members claiming that ratemaking authorized by the Federal Maritime Commission constituted illegal price-fixing. The district court dismissed the action because this ratemaking is expressly exempted from the antitrust laws by section 15 of the Shipping Act, 1916, 46 U.S.C. § 814. The court of appeals affirmed the dismissal.

Shipping Act Regulation of Ocean Carriers

Congress created the Federal Maritime Commission ("FMC" or "Commission") to serve as the "public arbiter of competition in the shipping industry" because it "antici-

pated that various anticompetitive restraints, forbidden by the antitrust laws in other contexts, would be acceptable in the shipping industry." *FMC v. Pacific Maritime Association*, 435 U.S. 40, 53 (1978). The Shipping Act accomplishes this by empowering the Commission to approve agreements among ocean carriers to set rates collectively. "[B]efore approval or after disapproval," it is unlawful to carry out such agreements. 46 U.S.C. § 814. So long as approved, the agreement itself and actions implementing the agreement are lawful under the Shipping Act and exempt from the antitrust laws. This immunity continues until expressly withdrawn by the FMC. *Id.*

The Shipping Act Proceedings Involving These Parties

Petitioners' antitrust claims are predicated on earlier proceedings under the Shipping Act.

In 1972, petitioner National Association of Recycling Industries, Inc. ("NARI"), requested that the Commission institute an investigation of the wastepaper rates of respondent Pacific Westbound Conference ("PWC" or "Conference"). NARI asserted that PWC[2] had set rates to the Far East that were unreasonably high and discriminatory. Although wastepaper rates were among the lowest in PWC's tariffs,[3] NARI contended that lower shipping rates for a

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[2]The respondents are PWC and certain of its present and former members, which we shall refer to collectively as "PWC". The petitioners are NARI and certain of its members, which we shall refer to collectively as "NARI".

[3]NARI's repeated characterization of PWC as a "monopoly" has no relevance to either application of the Court's standards governing review or analysis of the underlying antitrust questions. Nonetheless, we note that NARI has not been charged monopoly prices. The FMC in its investigation of the NARI/PWC dispute found that

different commodity, woodpulp, demonstrated that PWC's wastepaper rates were unlawfully high—in essence a discriminatory rate theory.[4]

In 1977, the Commission's administrative law judge ("ALJ") issued a recommended decision stating that PWC's wastepaper rates were unreasonably high under section 18(b)(5) of the Shipping Act and that therefore "PWC operated beyond the scope" of its section 15 immunity.[5] After independent review of the record, the Commission rejected the ALJ's recommendations in their entirety and upheld the wastepaper rates as lawful. The Commission found that wastepaper shippers had not been harmed by PWC's rates and that there was no evidence that PWC's rate structure had inhibited the export of wastepaper. *Pacific Westbound Conference—Investigation of Rates*, 21 F.M.C. at 840-42. The Commission specifically rejected the ALJ's construction of section 15 and ruled that conference ratemaking could not retroactively lose its immunity *even if* the rates were unreasonably high. *Id.* at 841 n.31.

On petition for review, the Commission's order was vacated. *National Association of Recycling Industries, Inc. v. FMC*, 658 F.2d 816, 829 (D.C. Cir. 1980) ("*NARI v.*

PWC's wastepaper rates were, as of 1979, "well below the average freight rate of the 113 highest tonnage/volume commodities moving to the Far East." Pacific Westbound Conference—Investigation of Rates, 21 F.M.C. 834, 835 n. 9 (1979).

[4]The rates of which NARI originally complained were in effect prior to 1975. Today, wastepaper rates are lower than woodpulp rates in most Far East trades. *See* CR 38 at 14.

[5]Pacific Westbound Conference—Wastepaper & Woodpulp from United States West Coast to Far East, 17 S.R.R. 929, 1000, 1002 (Initial Decision 1977).

FMC"). The court, one judge dissenting, disapproved the FMC's handling of the voluminous record. *Id.* at 825, 829. Further, it found that the FMC had incorrectly interpreted the legal standard of section 18(b)(5) by treating "unreasonableness" and "detriment to commerce" as independent instead of dependent criteria. *Id.* at 827. However, the court left undisturbed the Commission's conclusion that PWC had not operated outside the scope of its antitrust immunity. *Id.* at 826-27.

Before the D.C. Circuit, NARI argued that the ALJ had found PWC's ratemaking activities "violative of Section 15 of the Shipping Act—and beyond the limits of any antitrust immunity under that section of the Act". Brief for Petitioners at 52, *NARI v. FMC*. The Antitrust Division of the Department of Justice, while supporting NARI's contention that the Commission had misconstrued the standard of section 18(b)(5), nonetheless argued that the Commission's rejection of antitrust liability was correct on the facts of this case.[6]

The D.C. Circuit ruled that under the "analytically simpler approach" of section 18(b)(5) only the reasonableness of the wastepaper rates and their effect on U.S. foreign commerce were in issue and that it "need not rely on section 15" in reviewing the Commission's decision.

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[6]The Department's evaluation was that the case involved only ordinary ratemaking and, therefore, the Conference's antitrust immunity was not at stake:

> The language of section 15 does not oust the antitrust laws entirely from their application to regulated shipping matters, but it likewise did not intend to require that conference members tread quite so warily in the routine implementation of approved conference authority. [Brief for the United States at 36-37 n.29 (citations omitted), *NARI v. FMC*.]

658 F.2d at 826. To rule otherwise would present "a danger that § 18(b)(5) could swallow up a sizeable chunk of the antitrust freedom originating in § 15." *Id.* at 826-27 n.59. Thus, the D.C. Circuit held only that PWC's wastepaper rates could not be approved on the basis of the existing administrative record and left the Commission to decide if further proceedings would be necessary. *Id.* at 829.[7]

Instead of requesting further relief from the FMC,[8] petitioners brought this action.

The Antitrust Proceedings Below

In this action, NARI claims in essence that every time during the last seventeen years that PWC set a wastepaper rate, it violated the antitrust laws. App. at 42a-46a. NARI requests both treble damages and injunctive relief. *Id.* at 49a-51a.

In response to the complaint, PWC moved for dismissal on the ground that, because the challenged ratemaking was

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[7]Contrary to NARI's representations, the D.C. Circuit did not reinstate the ALJ's recommended findings, nor did it hold that PWC's wastepaper rates violated section 18(b)(5). The court's judgment was narrow and specific:

> ORDERED and ADJUDGED by this Court, that the order of the Commission on review herein is vacated and the case is remanded. The Commission may engage in any further administrative proceedings in this case not inconsistent with the opinion of this Court filed herein this date. [CR 36 at 35.]

[8]After the decision in *NARI v. FMC*, the Commission asked the parties if further Commission action were necessary. CR 24 at 108. In response, NARI urged the FMC not to proceed further. *Id.* at 111. Having taken that position, NARI may not now claim that "the Commission has arbitrarily and capriciously stalled and foreclosed all avenues of relief under the Shipping Act in this case, and it continues to do so today." Pet. at 29.

conducted under an express exemption from the antitrust laws, the complaint fails to state a claim for which relief may be granted. CR 24. The Antitrust Division of the Department of Justice, in an *amicus* brief filed on behalf of the FMC, supported PWC's argument for dismissal. CR 34. In granting PWC's motion, the district court held:

> Approved agreements and activities, including the setting of rates authorized by such agreements are immunized from the antitrust laws regardless of whether those rates are later found to be violative of substantive provisions of the Shipping Act. [App. at 21a.]

The district court did not, however, foreclose the possibility that NARI's additional and vague allegations concerning contracts to transport woodchips entered into individually by certain of the defendant carriers might, if amended, state a claim. Accordingly, the court granted NARI thirty days in which to file an amended complaint attempting to explain how these contracts violate the antitrust laws. *Id.* NARI filed no such amendment, and the district court ultimately entered a judgment dismissing the entire action with prejudice. CR 60.

On appeal,[9] the court unanimously rejected NARI's construction of section 15 and affirmed the district court

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[9]The Antitrust Division of the Department of Justice again filed an *amicus* brief in behalf of the FMC and in opposition to NARI. It stated:

> [NARI's] theory is contrary to the structure of the Shipping Act, and its effect would be to render the antitrust exemption authorized by section 15 nearly meaningless. NARI's theory is also inconsistent with judicially recognized standards for determining whether conference action is within the scope of an

in all respects. In regard to NARI's fundamental theory, the court ruled:

> Plaintiffs in this case . . . seek to impose retroactive antitrust liability for allegedly unreasonably high rates which have been set pursuant to an approved agreement and which have not yet been disapproved by the FMC. That result in our view would be fundamentally contrary to the Congressional intent behind the Shipping Act's regulatory scheme. The possibility of such potential retroactive liability for rates later declared unlawful would place carriers in a position of great uncertainty and would force them to seek formal FMC approval in connection with every rate change. Yet the language of section 15 clearly indicates that Congress intended to give carriers the latitude to enact new rates, without separate approval, to meet quickly changing market conditions. [App. at 4a (citation omitted).]

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approved agreement or constitutes a separate, unapproved agreement. Since NARI's complaint fails to allege that the wastepaper rates on which it bases its complaint were the product of or the means of implementing an unapproved agreement within the accepted meaning of that phrase, the district court properly dismissed the complaint for failure to state a cause of action. [Brief of Amicus Curiae Federal Maritime Commission at 10.]

REASONS FOR DENYING THE WRIT

The decision below does not conflict with any decision of the Court or any circuit and correctly applies the statute. Moreover, NARI has pled no agreement between competitors which has not been approved by the FMC, even though NARI had ample opportunity to do so. Therefore, the complaint was properly dismissed.

I. The Decision Below Is Fully in Accord with the Court's Decision in Carnation and Is Correctly Decided.

NARI's principal contention is that the decision below is in conflict with the Court's decision in *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966). NARI's argument is that the setting of rates—the most routine of actions by a shipping conference—may retroactively lose its antitrust immunity by some after-the-fact finding that the rates are unreasonable. Pet. at 13-17. Rather than support NARI's argument, however, *Carnation* repudiates it.

Carnation held that the implementation of ratemaking agreements not approved by the Commission is subject to the antitrust laws. 383 U.S. at 216. Plaintiffs there alleged inter-conference ratemaking under agreements that had neither been filed with the Commission nor approved by it. *Id.* at 215. The district court had dismissed the action on the ground that all ratemaking activities of the shipping industry had been exempted from the antitrust laws by the Shipping Act—in essence a ruling that the agency had exclusive jurisdiction over such matters.[10] The Court held

[10] *See* United States Navigation Co. v. Cunard Steamship Co., 284 U.S. 474 (1932).

the complaint actionable because section 15 of the Shipping Act contains an express antitrust exemption. The Court reasoned that the Act should not be construed as also creating an implied immunity applicable where the express exemption is not.

> The Shipping Act contains an explicit provision exempting activities which are lawful under § 15 of the Act from the Sherman and Clayton Acts. This express provision *covers approved agreements*, which are lawful under § 15, *but does not apply to the implementation of unapproved agreements*, which is specifically prohibited by § 15. [*Id.* at 216 (footnote omitted; emphasis supplied).]

In other words, ratemaking which implements an approved ratemaking agreement enjoys an express antitrust immunity, and ratemaking under an unapproved agreement does not. *Accord Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261, 271 (1968) (every agreement "filed with and approved by the Commission is immunized from challenge under the antitrust laws"); *Yellow Forwarding Co. v. Atlantic Container Line*, 668 F.2d 350, 352 (8th Cir. 1981) ("Agreements approved by the Commission and activities conducted pursuant to approved agreements are exempt from the antitrust laws"), *cert. denied*, 456 U.S. 962 (1982).[11]

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[11] NARI further argues that the decision below conflicts with *Carnation*, contending that the "decision implies that petitioners cannot seek relief under the antitrust laws in this case because" remedies exist under the Shipping Act. Pet. at 28. NARI mischaracterizes the decision below. The court did not rule that NARI had no antitrust remedy *because* Shipping Act remedies are available; it merely noted the weakness of NARI's "no remedy" claim. App. at 7a.

The conduct NARI challenges is routine ratemaking "contemplated by the plain language" of the PWC Agreement. *Pacific Westbound Conference v. FMC*, 440 F.2d 1303, 1309 (5th Cir.), *cert. denied*, 404 U.S. 881 (1971).[12] Section 15 allows tariff rates to take effect without prior approval, in recognition that such rates are the implementation of an approved agreement which does not require separate approval.[13]

The application of section 15 and *Carnation* to the facts alleged in the complaint is straightforward. Section 15 grants antitrust immunity to "[e]very agreement . . . lawful under this section," and it further provides that "agreements . . . shall be lawful only when and so long as

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[12]Contrary to NARI's contention, the decision below is entirely consistent with the Fifth Circuit's decision in Pacific Westbound Conference v. FMC. That case concerned construction of the agreements which had been in part the basis for the plaintiff's allegations in *Carnation*. The court held that an inter-conference agreement approved by the FMC authorized joint ratemaking but that certain "supplementary" agreements required separate FMC approval. *Id.* at 1312.

[13]Section 15 provides in pertinent part that:

> [T]ariff rates, fares, and charges, . . . agreed upon by approved conferences . . . if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title [section 18(b) of the Shipping Act] and with the provisions of any regulations the Commission may adopt.

The function of this provision is "to leave conferences free to adopt rates and to amend them from time to time *without the need for formal Board approval* of each such rate action as a separate section 15 agreement." Hearings on H.R. 4299 Before Special Subcomm. on Steamship Conferences of the Comm. on Merchant Marine and Fisheries, 87th Cong., 1st Sess. 461 (1961) (statement of Thomas E. Stakem, Chairman, Federal Maritime Board) (emphasis supplied).

approved by the Commission." Conversely, *Carnation* holds that agreements not filed and approved have no antitrust exemption. The PWC Agreement has been filed, approved, and not subsequently disapproved. It confers ratemaking authority. PWC's wastepaper rates were filed and published by the Conference in accordance with section 18(b) and applicable regulations. Thus, the PWC Agreement and the rates implementing it are lawful under section 15 and are therefore exempted from the antitrust laws.

The PWC Agreement contains an article which tracks the Shipping Act's anti-discrimination provisions.[14] Based on this, NARI argues that, because PWC's rates were supposedly discriminatory, they must be outside the scope of PWC's approved authority. Pet. at 14. This argument attempts to undermine the statutory immunity in the same manner as NARI's fundamental theory. As the court below ruled:

> [i]t would be anomalous to hold that defendants are exempt from application of the antitrust laws even if violation of the Shipping Act could be established, and then to hold that defendants were so liable for writing into their agreement provisions of the Shipping Act that they were bound by anyway. [App. at 7a, *quoting* the district court, App. at 20a-21a.]

The court below properly rejected NARI's arguments.[15]

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[14]This is a provision commonly contained in shipping conference agreements filed with and approved by the FMC. *See, e.g.*, Article 2 of FMC Agreement No. 17, Article 14 of FMC Agreement No. 150, Article 14 of FMC Agreement No. 3103, Article 8 of FMC Agreement No. 5680, and Article 7 of FMC Agreement No. 6060.

[15]A contrary interpretation of section 15 would wreak havoc with the statutory scheme. Conferences are primarily ratemaking organs. *NARI v. FMC*, 658 F.2d at 826 n.59. In our foreign trades, these rates constantly change in response to new competitive conditions.

(continued on next page)

II. In Affirming Dismissal of NARI's Woodchip Claim for Failure to State a Cause of Action, the Decision Below Is Consistent with the Decisions Cited by NARI and Judicial Standards.

NARI argues that the decision below erred in affirming the dismissal of its claim that certain contracts for the transportation of woodchips somehow violate the antitrust laws. In support of this argument, NARI cites a large number of cases stating maxims such as that an antitrust exemption will be "narrowly construed," an exemption may be lost when exempt parties act in concert with non-exempt parties, the antitrust laws apply to maritime contracts which the FMC has not approved, and courts should look to the "economic reality" of a transaction. Pet. at 17-21. None of these maxims is contradicted or offended by the dismissal below of NARI's woodchip claim.

The complaint contains no allegations that the woodchip contracts were the product of an unlawful conspiracy. Rather, the complaint twice says that certain defendant carriers "entered into individual long-term (10 years or more) contracts with competing shippers." App. at 36a, 45a. These agreements, NARI also says in its complaint, were "arrived at through free and open competition among defendant carriers." App. at 36a; see also *id.* at 35a.

The woodchip contracts were entered into by individual defendant carriers with individual shippers and are not

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Interpool, Ltd. v. FMC, 663 F.2d 142, 147-48 (D.C. Cir. 1980). The protection from the antitrust laws would be flimsy indeed if it could be lost retroactively every time a rate is subsequently examined under the "broad normative criteria", FMC v. Caragher, 364 F.2d 709, 713 (2d Cir. 1966), contained in the Act's substantive rate regulation provisions.

subject to PWC or FMC regulation.[16] No defendant has claimed that these contracts have antitrust immunity. However, the absence of antitrust immunity for the woodchip contracts does not mean that there is a cause of action under the antitrust laws.

NARI had ample opportunity to explain why it thinks there could be an antitrust violation in the woodchip contracts. The district court offered NARI thirty days to amend the complaint "setting forth more fully their theory of relief" regarding woodchips. App. at 21a. NARI refused, and the district court ultimately dismissed with prejudice. CR 60. The court of appeals specifically affirmed on this point because the woodchip contracts "are not alleged in any way to have been consummated in violation of the antitrust laws." App. at 8a.[17]

---

[16]These woodchips are transported by certain defendant carriers who are members of the PWC, but the transportation by each is as an independent carrier. This independence is both from the PWC and from other carriers; the woodchip carriers do not agree with each other on any subject. The transportation circumstances for woodchips are radically different from those pertaining to Conference movements. Woodchips move in bulk under long-term contracts in the open holds of specially designed vessels dedicated to woodchip service. App. at 58a. Wastepaper moves in common carriage in specially designed vessels, each capable of accommodating several hundred containers transporting all variety of containerized cargo. *Id.* at 59a. Because the transportation economics are different, the rates are different. Because the woodchips move in bulk, their rates are not subject to the FMC's tariff filing requirements. 46 U.S.C. § 817(b)(1). The woodchip vessels are not common carriers and therefore, are not subject to FMC regulation. *Id.* at § 801.

[17]Neither did the courts below fail to view NARI's claims as a whole, as NARI argues at 20 *citing* Swift & Co. v. United States, 196 U.S. 375 (1905) and Continental Ore v. Union Carbide & Carbon Co., 370 U.S. 690 (1962). Rather, the district court based no

III. The Decision Below Does Not Conflict with Any Decision of Any Other Circuit.

NARI's claims that the decision below conflicts with other decisions merit only brief mention here.

First, the Ninth Circuit did not "acknowledge the inconsistency of its decision" with *United States v. Bessemer & Lake Erie Railroad*, 717 F.2d 593 (D.C. Cir. 1983), as NARI claims. Pet. at 23. Rather, the decision below *distinguished Bessemer* on various grounds, including the fact that it involved agreements *between* competitors "wholly outside the scope of ICC-sanctioned rate-making." App. at 5a-6a.[15]

Second, while there is a conflict between the decision below and *Sabre Shipping Corp. v. American President Lines, Ltd.*, 285 F.Supp. 949 (S.D.N.Y. 1968) (interlocutory order), *cert. denied sub nom. Japan Line, Ltd. v. Sabre Shipping Corp.*, 407 F.2d 173 (2d Cir.), *cert. denied*, 395 U.S. 922 (1969), *Sabre* is not a decision on the merits of this issue by either a court of appeals or this Court. The

---

determination of any issue on any restricted segment of NARI's evidence. In fact, the court granted NARI the opportunity to set forth more fully its theory of relief by pleading additional facts or by explaining further how the alleged non-immune conduct might violate the antitrust laws. App. at 21a. The mere fact that the court discussed separately the immunity of PWC wastepaper rates and the non-immune, individual woodchip contracts is not a prohibited compartmentalization.

[15]Georgia v. Pennsylvania R., 324 U.S. 439 (1945), on which NARI also relies, has little relevance to its claims. There the Court rejected an argument that the Interstate Commerce Act conferred implied antitrust immunity for rate-fixing by railroad rate bureaus. *Id.* at 456-57. Congress responded by enacting a limited and express antitrust exemption for such rate bureau agreements. *See* United States v. Bessemer & Lake Erie R.R., 717 F.2d at 595-96.

district court decision in *Sabre* has never been cited favorably by any other court for the proposition that NARI asserts. The Antitrust Division of the Department of Justice has repeatedly rejected *Sabre's* construction of section 15.[19] As the court of appeals and district court decisions below explain, *Sabre* was incorrectly decided because it confused agreements which authorize ratemaking with the rates themselves. App. at 5a & n.1, 14a-17a.[20]

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[19]Brief for the United States at 36-37 n.29, *NARI v. FMC*; Supplemental Reply Brief for the United States at 6-7 n.7, United States v. FMC, 694 F.2d 793 (D.C. Cir. 1982); Brief for Amicus Curiae Federal Maritime Commission (filed by the Antitrust Division in the Ninth Circuit below) at 20-21; *see also* note 9, *supra*.

[20]The decision below does not conflict with In re Ocean Shipping Antitrust Litigation, 500 F. Supp. 1235 (S.D.N.Y. 1980), because that case involved agreements between competing carriers which had not been approved by the FMC. Here, NARI has pled no such agreements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JPL:RAL

February 6, 1984

Clerk of the Court
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: National Association of Recycling Industries, Inc., et al. v. American Mail Line, Ltd., et al., Docket No. 83-1200

Dear Sir:

We are counsel to Waterman Steamship Corporation, a respondent in the above action. We are writing to advise you and all parties to this matter that on December 1, 1983 Waterman filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code. Enclosed is a copy of the petition and of the certificate of filing. Pursuant to 11 U.S.C. §362 all actions pending against Waterman at the time of the filing are stayed and any attempts to proceed further against Waterman with respect to any such action are null and void.

Please contact us if we can be of any assistance and provide any further information.

Respectfully yours,

James P. Laughlin

Enclosure

cc: John P. Meade, Esq.
Edward L. Merrigan, Esq.
Thomas E. Kimball, Esq.
Robert J. Wiggers, Esq.
Robert S. Zuckerman, Esq.
Reed M. Williams, Esq.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	In Proceedings For A Reorganization Under Chapter 11
WATERMAN STEAMSHIP CORPORATION, Debtor.	:	Case No. 83 B 11732 (HCB)
Employer I.D. No. 63-0220-640	:	PETITION

1. Petitioner's mailing address is 120 Wall Street, New York, New York 10005, New York County.

2. Petitioner is a New York corporation and has been domiciled in the State of New York for the one hundred eighty days immediately preceding the filing of this petition.

3. Petitioner is qualified to file this petition and is entitled to the benefits of title 11, United States Code as a voluntary debtor.

4. Petitioner intends to file a plan pursuant to chapter 11 of title 11, United States Code.

5. Exhibit A is attached to and made a part of this petition.

WHEREFORE, Petitioner prays for relief in accordance with chapter 11 of title 11, United States Code.

Dated: New York, New York
November 30, 1983

WHITE & CASE
Attorneys for Petitioner

By _____
A Member of the Firm
14 Wall Street
New York, New York 10005
(212) 732-1040

docketed 12-1-83

I, Edward P. Walsh, President and Chief Executive Officer of the corporation named as petitioner in the foregoing petition, certify under penalty of perjury that the foregoing is true and correct, and that the filing of this petition on behalf of the corporation has been duly authorized.

Sworn to before me this
16th day of November, 1983

Notary Public

ALLAN L. GROPPER
NOTARY PUBLIC, State of New York
No. 31-6660600
Qualified in New York County
Commission Expires March 30, 1984

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	: In Proceedings For A Reorganization Under Chapter 11
WATERMAN STEAMSHIP CORPORATION,	:
Debtor.	: Case No. 83 B
Employer I.D. No. 63-0220-640	: EXHIBIT A TO PETITION

1. Petitioner's employer's identification number is 63-0220-640.

2. Petitioner's securities are not registered under Section 12 of the Securities and Exchange Act of 1934.

3. The following financial data is the latest available information and refers to petitioner's condition as of October 31, 1983:

a. Total assets:	$228,402,798
b. Total liabilities:	$242,391,666
Secured debt, excluding that listed below	$113,299,000
Debt securities held by more than 100 holders	0
Other liabilities, excluding contingent or unliquidated claims	$ 78,549,000
Number of shares of common stock	400

See also Exhibit "C" annexed to Affidavit Under Local Rule XI-2 for additional financial data and information which refers to petitioner's condition.

4. The following is a brief description of petitioner's business: Waterman Steamship Corporation is engaged in the operation of eight United States flag cargo vessels in the foreign commerce of the United States pursuant to Operating-Differential Subsidy agreements with the United States Maritime Administration.

5. The name of any person who directly or indirectly owns, controls, or holds, with power to vote, 20% of petitioner is:

> Waterman Marine Corporation, a Delaware corporation owns 100% of the common stock of petitioner.

6. Petitioner owns all of the stock of the following subsidiaries which are largely inactive or in the process of being liquidated: Waterman Corporation of California, Waterman Lines (Antwerp), S.A., Waterman Lijnen (Rotterdam) B.V., and Waterman Linien (Breman) GmbH.

WATERMAN STEAMSHIP CORPORATION

By _____
President

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	In Proceedings For a Reorganization Under
WATERMAN STEAMSHIP CORPORATION,	:	Chapter 11
Debtor.	:	Case No. 83 B

AFFIDAVIT UNDER LOCAL RULE XI-2

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

EDWARD P. WALSH, being duly sworn, deposes and says:

1. I am President and Chief Executive Officer of Waterman Steamship Corporation ("Waterman") and am familiar with the assets, liabilities and business of such corporation.

2. The information contained herein is submitted in connection with the chapter 11 petition of the above-captioned debtor filed simultaneously herewith. Waterman is a New York corporation with its principal place of business at 120 Wall Street, New York, New York 10005. The information is set forth on a consolidated basis for Waterman and four subsidiaries, Waterman Corporation of California, Waterman Lines (Antwerp) S.A., Waterman Lijnen (Rotterdam) B.V., and Waterman Linien (Breman) GmbH, which are inactive or in the process of being liquidated.

3. There is no other or prior bankruptcy proceeding pending.

4. The debtor has annexed hereto a list of its 20 largest unsecured creditors, excluding creditors who would not be entitled to vote at creditors' meetings, creditors employed by the debtor, and insiders.

5. There are no suits pending against the debtor or its property in which a judgment or seizure of property is known to be imminent.

6. There is no property of the debtor in the possession or custody of any public officer, receiver, trustee, assignee for the benefit of creditors, mortgagee, pledgee, assignee, liquidator or secured creditor, except for certain special funds and deposits set aside by the debtor in the course of its business and held by certain creditors.

7. Waterman has outstanding $88,748,000 in various Title XI U.S. Government Guaranteed Ship Financing Bonds and Notes, held by less than 100 holders at October 31, 1983. Waterman has 400 shares of common stock, no par value, all owned by Waterman Marine Corporation.

8. Annexed hereto as Exhibit 1 is a schedule of the premises occupied by the debtor under a lease. No negotiations are ongoing relative to a modification of these leases.

9. Annexed hereto as Exhibit "2" is Waterman's consolidated Balance Sheet (unaudited) as at October 31, 1983. Waterman's approximate total assets and liabilities as of October 31, 1983, were $228,402,798 and $242,391,666, respectively.

10. Waterman desires to continue the operation of its business and the management of its property as a debtor in possession, and in connection therewith submits the following information:

(a) Waterman currently employs approximately 600 persons. The estimated amount of the payroll to employees, exclusive of stockholders, officers and directors, for a period of 30 days following the filing of the chapter 11 petition herein, is approximately $550,000 for shoreside employees and $1,500,000 in crew wages.

(b) The estimated amount currently being paid and proposed to be paid to Waterman's officers and directors for the 30 days following the filing of the petition is $110,000.

(c) The debtor estimates that operating expenses for the 30-day period after the filing of the chapter 11 petition, exclusive of payroll, will approximate $18,000,000.

(d) It is estimated that Waterman will break even for the period of 30 days following the filing of the petition.

11. Waterman's financial difficulties and the reasons for filing a chapter 11 petition are attributable to the following circumstances. Waterman is engaged in the

operation of eight United States flag cargo vessels in the foreign commerce of the United States. Like many ocean carriers, Waterman has been severely affected by extreme downward pressure on freight rates. Over-capacity on its trade routes has blocked freight rate increases needed to meet current operating costs. In addition, crew wages and benefits, set on an industry-wide basis, have sharply increased overall operating expenses. Waterman is also faced with high financing costs on its two newest vessels. In combination, these factors have caused losses and a decline in working capital.

12. Waterman believes that it has important assets which can form the basis for a successful restructuring in the best interests of its creditors and stockholder. In particular, Waterman's eight vessels are among a handful of "LASH" ("Lighter Aboard Ship") vessels now in existence. A LASH vessel is a ship designed to carry 89 lighters (barges), with a large gantry crane capable of loading or unloading a fully-loaded barge weighing as much as 510 short tons. The shallow-draft barges are able to operate on rivers, in island chains and in harbors that are too shallow for larger vessels. The LASH vessels give Waterman a unique capability and have resulted in its being the largest United States carrier of natural rubber from Southeast Asia.

13. Waterman has also received a binding award from the Military Sealift Command of the United States Navy ("MSC") for the time charter of three "Ro Ro" (Roll-On/Roll-Off) vessels which Waterman formerly owned and which are now being modified to meet MSC specifications. The three vessels are currently required to be delivered on September 30, 1984, December 31, 1984 and April 30, 1985. The charter-hire payable under the charters, consisting of a component for capital sufficient to service long-term debt and equity and an operating component, will be very valuable to Waterman. The operating component, after deduction of operating expenses, is expected to be worth $7.6 million per year for coverage of overhead and contribution to profit, and this amount will increase over the 25 year life of the charter.

14. In order for Waterman to earn the benefits of the MSC charters and to realize on the unique capabilities of its LASH vessels, it must remain in business and continue its operations. Given sufficient time, I believe the debtor will be able to propose a plan of reorganization which will realize far more for the benefit of its creditors than a precipitate liquidation.

Edward P. Walsh

Sworn to before me, this
30th day of November, 1983.

Notary Public

ALLAN L. GROPPER
NOTARY PUBLIC, State of New York
No. 31-6650600
Qualified in New York County

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	In Proceedings For A Reorganization Under Chapter 11
WATERMAN STEAMSHIP CORPORATION,	:	
Debtor.	:	Case No. 83 B
	:	

LIST OF THE DEBTORS' 20 LARGEST UNSECURED CREDITORS

The following is a list of the debtor's creditors holding the 20 largest unsecured claims which is prepared in accordance with Rule 1007(d) for filing in this chapter 11 case. The list does not include (1) those persons who come within the definition of insider set forth in 11 U.S.C. § 101(25), (2) secured creditors unless the value of the collateral is such that the unsecured deficiency places the creditor among the holders of the 20 largest unsecured claims, or (3) governmental units, except that certain of the claims may be secured by maritime liens on the debtor's vessels. The amounts listed here are not to be taken as admissions of amounts due and owing. The debtor reserves its right to modify the figures on this table and to object to any corresponding claims at an appropriate time.

Exxon International Company 200 Park Avenue Florham Park, New Jersey 07932 Attn: Roland Dupont, Treasurer (201) 765-4336	$2,423,880 Fuel
Marsh & McLennon, Inc. 1221 Avenue of the Americas New York, New York 10020 Attn: Ms. Louise Varnas (212) 997-5460	$1,324,530 Insurance
Central Gulf Lines, Inc. International Trade Mart 2 Canal Street New Orleans, Louisiana 70130 Attn: Gene Vause (504) 529-5461	$1,185,159 Charter Hire
Fred S. James & Co. P.O. Box 8191 Church Street Station New York, New York 10249 Attn: David Linforth (202) 747-6730	$840,835 Insurance
Buck Kreihs Co., Inc. P.O. Box 53305 New Orleans, Louisiana 70153 Attn: Earl Lagraize (504) 524-7681	$822,272 Repairs
Ryan Walsh Stevedoring Co. P.O. Box 2188 Mobile, Alabama 36652 Attn: W.J. Colley (205) 438-4771	$646,228 Stevedoring
Masters Mates & Pilots Plans P.O. Box 12600 Church Street Station New York, New York 10249 Attn: George Korba (212) 425-8530	$576,268 Welfare & Benefit Plan

Swiftships Inc. P.O. Box 1908 Morgan City, Louisiana 70381 Attn: Tony Bergeron (504) 689-3428	$562,127 Repairs
Chrysler Financial Corp. 900 Tower Drive Troy, Michigan 48098 Attn: Robert A. Link, Corporate Secy. (313) 879-3060	$507,945 Charter Hire
Marine Engineers Beneficial Assoc. 11 Light Street Baltimore, Maryland 21202 Attn: Dave Flyer (301) 547-9111	$469,894 Welfare & Benefit Plan
International Terminal Operations, Inc. 17 Battery Place New York, New York 10004 Attn: Hank Ingram (212) 709-0590	$438,400 Stevedoring
Seafarers International Union Plan 5201 Auth Way Camp Springs, Maryland 20746 Attn: Jim Sexton (301) 899-0675	$369,677 Welfare & Benefit Plan
T. Smith & Son, Inc. P.O. Box 2690 New Orleans, Louisiana 70116 Attn: John Viola (504) 524-0611	$297,313 Towing
Algiers Iron Works & Dry Dock P.O. Box 6068 New Orleans, Louisiana 70114 Attn: Jack Oser (504) 362-6711	$264,125 Repairs
Vemar Inc. P.O. Box 84278 Dallas, Texas 75284 Attn: Mr. McIntyre (713) 452-6769	$232,999

Colle Towing Co. P.O. Box 340 Pascagoula, Mississippi 39567 Attn: Charles McVay (201) 762-5700	$198,298 Towing
I.T.O. Corp. of Virginia 7737 Hampton Blvd. Norfolk, Virginia 23505 Attn: Hank Ingram (212) 709-0590	$191,494 Stevedoring
Balehi Marine P.O. Box 600 Lacombe, Louisiana 70445 Attn: (504) 522-5586	$177,660 Repairs
Manufacturers Hanover Leasing Corp. 270 Park Avenue New York, New York 10017 Attn: Franklin E. Hawk, S.V.P. (212) 286-6840	$169,315 Charter Hire
Boland Marine & Mfg. Co. P.O. Box 53287 New Orleans, Louisiana 70153 Attn: L. Carpenter (504) 581-5800	$160,779 Repairs

WATERMAN STEAMSHIP CORPORATION
Debtor and ~~Debtor in~~ Possession

By: _____

Exhibit 1

WATERMAN STEAMSHIP CORPORATION
Rental Agreements on Premises

OFFICE	ANNUAL EXPENSE	TERM
New York	$ 311,362	01/01/75 - 11/30/89
Baltimore	14,499	06/01/83 - 05/31/84
Houston	43,558	01/01/82 - 12/31/84
San Francisco	18,737	-
Chicago	14,184	05/01/81 - 04/30/84
San Pedro	4,208	07/01/83 - 08/01/86
New Orleans	75,630	02/01/83 - 01/31/85
Mobile	149,152	11/01/81 - 10/31/84
Washington D.C.	75,061	07/01/82 - 06/30/87

Exhibit 2

WATERMAN STEAMSHIP CORPORATION
AND SUBSIDIARY CONSOLIDATED

BALANCE SHEET AS OF OCTOBER 31
(Unaudited)

ASSETS	1983
CURRENT ASSETS	
Cash	$ 1,404,666
Account Receivable	
Related Companies	3,593,318
Traffic Accounts	22,922,879
U.S. Maritime Administration	6,000,000
Miscellaneous Outside	2,663,781
Insurance Claims Receivable	3,871,416
Prepaid Expenses	10,392,035
Inventories	725,457
Total Current Assets	51,574,528
SPECIAL FUNDS AND DEPOSITS	
Escrow Fund	106,789
Security Deposit	1,932,828
	2,039,617
PROPERTY AND EQUIPMENT	
Cost	201,058,308
Less Reserve for Depreciation	49,902,226
	151,156,082
OTHER ASSETS	19,644,476
DEFERRED CHARGES	3,988,095
TOTAL ASSETS	$228,402,798
LIABILITIES AND STOCKHOLDERS' EQUITY (DEFICIENCY)	
CURRENT LIABILITIES	
Long Term Debt Due In One Year	$ 9,076,240
Accounts Payable - Miscellaneous Outside	19,738,318
Accrued Liabilities	
Accrued Vessels Expense - Terminated voyages	12,536,615
Other Accrued Liabilities	8,074,341
Total Current Liabilities	49,425,514
VOYAGES IN PROGRESS	
Revenues	38,134,944
Expenses	15,033,811
	23,101,133
LONG TERM DEBT LESS DUE IN ONE YEAR	150,228,255
NOTE PAYABLE - RELATED COMPANY - DUE AFTER ONE YEAR	2,000,000
OTHER LONG TERM LIABILITIES	1,329,040
DEFERRED CREDITS	3,954,893
OPERATING RESERVES	12,352,831
STOCKHOLDERS' EQUITY (DEFICIENCY)	
Common Stock	300,000
Paid In Surplus	9,650,000
Retained Earnings (Deficit)	(23,938,868)
	(13,988,868)
TOTAL LIABILITIES AND STOCKHOLDERS' EQUITY (DEFICIENCY)	$228,402,798

(2)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

WATERMAN STEAMSHIP CORPORATION

CASE NO. 83 B 11732 (HCB

IN PROCEEDINGS FOR
REORGANIZATION UNDER
CHAPTER 11

Debtor.
----------X

CERTIFICATE OF FILING CHAPTER 11

I, EUGENE F. O'CONNOR, Clerk of the United States Bankruptcy Court for the Southern District of New York, do hereby certify that the above Debtor, on the 1st day of December, 1983, filed a case under Chapter 11 of the Bankruptcy Code and as of this date said case is still pending. The Debtor has been continued in possession of its property and management of this business and no trustee has been appointed

DATED: NEW YORK, NEW YORK

EUGENE F. O'CONNOR
Clerk, Bankruptcy Court

by: S. Gonzalez
Deputy Clerk
Diana Gonzalez

FILE COPY

Seal of the Court

No. 83-1200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., ASSIGNEE OF BERG MILL SUPPLY CO., INC.; CONSOLIDATED FIBRES, INC., PAPER FIBERS, INC., and SASSOON INTERNATIONAL CORPORATION,
Petitioners,

v.

AMERICAN MAIL LINE, LTD., PACIFIC WESTBOUND CONFERENCE, JAPAN LINE, LTD., KOREA MARINE TRANSPORT CO., LTD., MITSUI O.S.K. LINES, LTD., SEA-LAND SERVICE, INC., SHOWA LINE, LTD., *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS REPLY BRIEF

EDWARD L. MERRIGAN
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Counsel of Record for Petitioners

Of Counsel:
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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C. (202) 347-8203

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1200

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., *et al*

Petitioners,

v.

AMERICAN MAIL LINE, LTD., *et al.*,

Respondents.

PETITIONERS REPLY BRIEF

I

Certiorari Is Imperative To Reestablish The Correct Rule Of Law Mandated In This Case By The Legislative History Of The Shipping Act, The Shipping Act Itself, Relevant Decisions Of The Courts Thereunder, And By The Justice Department's Antitrust Enforcement Record In Other Similar Rate-Fixing Cases Against Rail, Ocean and Motor Carriers. Under the Correct Rule, Respondents' Unapproved, Discriminatory, Anticompetitive Rate-Fixing Is Plainly Not Immune From the Antitrust Laws.

It is vitally important to note from the very outset that, contrary to the Ninth Circuit's erroneous decision and the specious, misleading brief filed in this Court by respondents, this is *not* a case where petitioners challenge mere "*routine ratemaking contemplated by the plain language of the PWC Agreement.*"[1] This is *not* a situation where, in the course of myriad, day-to-day ratemaking activities, respondents unwittingly adopted an isolated rate which was later dis-

[1] See App. 4a, 5a; Respondents' Brief, pgs. 7, 10-11.

covered to be unreasonably high or merely violative of "broad normative rate criteria."[2] On the contrary, the complaint in this action charges that, *for more than 16 years*, the Pacific Westbound Conference and its giant ocean carrier members, which have held a transportation monopoly over 95% to 99% of this nation's West Coast wastepaper exports to the Far East, have *systematically* and *persistently* combined and conspired among themselves, *and with shippers who compete with the wastepaper exporters*, to restrain wastepaper exports through a three (3)-tier system of *grossly discriminatory, illegal, anticompetitive* rate-fixing that was never contemplated by—and which clearly violates—the Conference's approved charter agreement under Section 15 of the Shipping Act.[3]

It is plainly wrong, therefore, for respondents to suggest that here petitioner's only claim is that "ratemaking *authorized* by the Federal Maritime Commission constitute[s] illegal price-fixing."[4] On the contrary, the complaint charges that respondents operated *both* (a) *beyond the scope, and in violation*, of the Conference's approved agreement under the Shipping Act, and (b) *through totally unapproved rate-fixing agreements with petitioners' competitors*, the wood chip shippers, to impose and enforce their monopolistic, discriminatory, anticompetitive 3-tier rate-fixing system on the wastepaper shippers (App. 33a-46a).

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[2] See respondents' proposed Question No. 1; see also respondents' brief, pgs. 6, 7.

[3] Respondents speciously contend, at pages 2, 3 of their brief, that wastepaper rates are "among the lowest in PWC's tariffs," and that today "wastepaper rates are lower than woodpulp rates." This is untrue. The Maritime Commission charged in this case that respondents' wastepaper rates violate four (4) different sections of the Shipping Act, and that they are exceedingly discriminatory (App. 39a; 53a-54a). Both the Commission's ALJ and the D.C. Circuit ruled that said rates are "exorbitant," "outrageously high," detrimental to commerce and contrary to the public interest. *National Assn. of Recycling Ind.* v. *F.M.C.*, 658 F.2d 816, 823, 825 (D.C. Cir. 1980). Currently, respondents' wastepaper-woodpulp-wood chip rates to Japan, for example, are still exceedingly discriminatory and violative of both Article 2 of PWC's conference agreement and the Shipping Act (App. 45a, 68a).

[4] Respondents' brief, pgs. 1, 5.

Respondents themselves necessarily recognize in their brief: "*Carnation* held that the implementation of ratemaking agreements not approved by the Commission is subject to the antitrust laws."[5] And, respondents agree further that: "*Carnation* holds that agreements not filed and approved have no antitrust exemption."[6] Having made those concessions, respondents thereupon unqualifiedly state: "The wood chip contracts were entered into by individual defendant carriers with individual shippers and are not subject to PWC or FMC regulation. *No defendant [can claim] that these contracts have antitrust immunity.*"[7]

Plainly, therefore, the Ninth Circuit grievously erred when it granted sweeping antitrust immunity to respondents' 3-tier rate-fixing system in this case albeit the court recognized that (1) such discriminatory rate-fixing is *prohibited* by Article 2 of the Pacific Westbound Conference's approved charter agreement under Section 15 of the Shipping Act (App. 6a, 7a); and (2) that, in major part at least, respondents' rate-fixing system depends on secret rate-fixing agreements between the carriers and competing shippers that have *never been approved* under the Shipping Act, and which respondents now concede have no antitrust immunity whatsoever (App. 6a).

Petitioners respectfully submit that the *correct rule*, mandated in this case by the legislative history of the Shipping Act, the Shipping Act itself, the pertinent decisions thereunder, and by the Justice Department's recent antitrust enforcement record in cases of this kind against rail, ocean and motor carriers alike, is: *Since respondents' discriminatory, anticompetitive rate-fixing is (i) beyond the scope of, not contemplated or specifically authorized, and actually prohibited, by the Conference's approved charter agreement; and since it is (ii) in part at least the product of rate-fixing agreements between carriers and shippers not eligible for approval, and thus never approved, under the Shipping Act, such rate-fixing*

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[5] Respondents' brief, pg. 8.

[6] *Id.*, pg. 11.

[7] *Id.*, pgs. 12, 13.

is not immune from the antitrust laws under Section 15 of the Shipping Act.

The Shipping Act, of course, was enacted as a result of the Alexander Report—an exhaustive inquiry made by the House Merchant Marine Committee in 1914 into the practices of conferences such as the Pacific Westbound Conference.[8] The House committee received many complaints that conferences "completely dominate[d]" shippers with whom they dealt; subjected shippers to "excessive rates," and regularly discriminated between competing shippers in both rates and cargo space.[9] Thus, the Committee actually considered *total prohibition of conference rate-fixing agreements.*[10] Finally, however, the Committee recommended that only agreements *actually approved* in advance by a federal supervisory agency be lawful; but it insisted that "any such agreements, or parts thereof, [found] to be discriminatory or unfair in character, or detrimental to the commercial interests of the United States, be rejected and canceled."[11] Finally, the committee directed that "all modifications and cancelations of such agreements as may be made from time to time should also be promptly filed" and approved in advance.[12]

Consequently, when Congress enacted the Shipping Act in 1916, Section 15 required that all agreements among carriers, or between carriers and shippers, that fix rates, provide special rates, or otherwise control, regulate, prevent or destroy competition, be filed with the Maritime Commission.[13] The term '*agreement*' was broadly defined to include all "understandings, conferences and other arrangements." The Commission, in turn, was ordered by Congress to *disapprove* any agreement—or any proposed modification or cancelation

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[8] H.R. Doc. No. 805, 63rd Cong., 2d Sess. 1914.

[9] *Id.*, at pgs. 417, 418.

[10] *Id.*, at pgs. 415, 416.

[11] *Id.*, at pgs. 419, 420.

[12] *Id.*, at pg. 420.

[13] 46 U.S.C. § 814, 39 Stat. 733, 9 7 16. The Commission was first known as the Federal Maritime Board.

of a previously approved agreement—which is "*unjustly discriminatory or unfair as between . . . shippers [or] exporters*," or detrimental to "the commerce of the United States," or "contrary to the public interest," or violative of any provision of the Shipping Act.[14] Under Section 15, "any agreement not approved" is "unlawful." Modifications and cancelations of previously approved agreements are likewise unlawful until specifically approved by the Commission.[15] Finally, under Section 15, *only lawful, approved agreements, modifications and cancelations are exempt from the antitrust laws.*

Based on the aforesaid legislative history of the Shipping Act and the very restrictive statutory language employed by Congress in Section 15 itself, this Court has consistently construed the antitrust exemption thus provided for concerted rate-fixing activities to be *partial* only; it is strictly limited to "approved agreements, which are lawful under § 15, but does not apply to the implementation of unapproved agreements"; and it does *not* immunize discriminatory rate-fixing arrangements "which have the purpose and effect of stifling . . . competition" among shippers or exporters. *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 216, 86 S.Ct. 781 (1966); *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 488-93, 78 S.Ct. 851 (1958). Indeed, this Court has "emphasized that the freedom allowed conference members to agree upon terms of competition subject to Board approval is *limited* to the freedom to agree upon terms regulating competition *among themselves*" (356 U.S. 491); Congress "*flatly outlawed* conference practices designed to destroy . . . competition" of independent carriers, or among shippers or exporters whose ability to ship is dominated by a conference (356 U.S. 491-93).

Accordingly, courts have repeatedly *rejected* the proposition—again advanced by respondents here and erroneously sustained by the Ninth Circuit—that whenever a conference like PWC holds an approved conference agreement under

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[14] *Id.*

[15] *Id.*

Section 15 which simply legalizes and grants antitrust immunity to *collective ratemaking among conference members*, the conference and its members automatically have the additional right, lawfully and with antitrust immunity, to engage in discriminatory, anticompetitive rate-fixing against the shippers they dominate. In each case, the courts have ruled that discriminatory rate-fixing is *beyond the scope of basic approved conference agreements under § 15; is unlawful and totally without antitrust immunity* unless the conference agreement has been specifically *modified*, with Commission approval under § 15, to authorize such anticompetitive rate-fixing—and of course, § 15 prohibits Commission approval of rate-fixing that discriminates among shippers or exporters. *Pacific Westbound Conference* v. *Leval & Co., Inc.*, 269 P.2d 541 (S.Ct. Ore., 1954), *cert. denied* 348 U.S. 897; *Pacific Westbound Conference* v. *F.M.C.*, 440 F.2d 1303, 1309-10 (5th Cir. 1971), *cert. denied* 404 U.S. 881 (1971); *Isbrandtsen Co., Inc.* v. *United States*, 211 F.2d 51, 56-57 (D.C. Cir., 1954), *cert. denied* 347 U.S. 990; *River Plate and Brazil Conferences* v. *Pressed Steel Car Co.*, 227 F.2d 60, 63 (2d Cir., 1955); *Persian Gulf Outward Freight Conference* v. *F.M.C.*, 375 F.2d 335, 341-42 (D.C. Cir., 1967). In *Interpool, Ltd.* v. *F.M.C.*, 663 F.2d 142, 149 (D.C. Cir., 1980), the fundamental rule was stated as follows: "Although these conferences have been authorized to set rates and charges, the courts and the Commission have consistenly held that . . . general authorizations [under Section 15] do *not* permit conferences to act in a manner that will affect competition in a manner unforeseen when the conference agreements were approved."

The facts here militate even more strongly against respondents' claim of immunity than those in the decisions cited above because in this case Article 2 of PWC's approved agreement has always expressly *prohibited* rate-fixing that discriminates among shippers (App. 70a). That covenant against discriminatory rate-fixing was the essential predicate for § 15 approval by the Maritime Board in 1923. The subsequent practice by PWC and its members of constantly setting grossly discriminatory, anticompetitive rates for competing wood chip, woodpulp and wastepaper exporters plainly was not even remotely con-

templated when the PWC Agreement was approved; it violates the approved agreement; is outside its scope; and thus has no antitrust immunity in this case.

Contrary to respondents' brief, Justice Department antitrust enforcement policy against rail, motor and ocean carriers alike in similar cases fully supports and buttresses this conclusion. See *United States* v. *Baltimore & O.R.R.*, 538 F.Supp. 200, 206-208, *aff'd sub. nom. U.S.* v. *Bessemer & Lake Erie R.R.*, 717 F.2d 593, 599-600 (D.C. Cir. 1983) (railroads, with rate-fixing immunity under an ICC-approved agreement under § 5a of the Commerce Act, successfully criminally prosecuted under the Sherman Act for anticompetitive rate-fixing beyond scope of approved agreement); *United States* v. *Atlantic Container Line, Ltd.*, Crim. No. 79-271 (D.C. D.C. 1979) and *In Re Ocean Antitrust Litigation*, 500 F.Supp. 1235 (D.C. N.Y. 1980) (ocean carriers successfully criminally prosecuted under Sherman Act for imposing anticompetitive rates on shippers through rate-fixing arrangements not approved under § 15); and *United States* v. *Niagra Frontier Tariff Bureau, Inc.*, 49 Fed. Reg. 5388 (2/13/84), *printed in supplement to this reply brief* (motor carriers, with rate-fixing immunity under ICC-approved agreement, successfully sued under the Sherman Act for fixing anticompetitive rates in violation of approved agreement).[16]

Petitioners submit, therefore, that when the correct rule of law is applied to this case the Ninth Circuit's decision is unsustainable; and clearly the Maritime Commission's ALJ, whose ruling was substantially *affirmed* by the D.C. Circuit in the prior case, correctly ruled that here "PWC misued its conference agreement . . . so injuriously [that it] operated beyond the scope of the Commission's grant of partial immunity from the antitrust laws." *Nat. Assn. of Recycling Ind.* v. *F.M.C.*, at

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[16] In this case, as required by law, Justice Department attorneys simply appeared as counsel for amicus curiae Maritime Commission (*See Ocean Antitrust Litigation*, at 500 F.Supp. 1238-1239). In the Ninth Circuit, they declined (on behalf of the Commission) to take a position on whether the totally unapproved wood chip rate-fixing contracts necessitated denial of antitrust immunity here (See FMC's brief, Ninth Circuit, pg. 22).

658 F.2d 823, 829.[17] Imposition of antitrust liability in this suit under the Sherman Act will *not* be "*retroactive*" in any sense (See App. 4a), for here PWC's charter agreement has always precluded antitrust immunity for discriminatory, anticompetitive rate-fixing (App. 70a). Under § 15 and the foregoing authorities, PWC actually would have had to gain Commission approval—which is impossible under § 15—of a "*cancelation*" of Article 2 of its approved agreement for the type of anticompetitive rate-fixing challenged by the complaint in this case to have any claim to exemption from the antitrust laws. *Pacific Westbound Conference* v. *Leval & Co. Inc.*, *supra*, at 269 P.2d 543, 44; *Isbrandtsen Co., Inc.*, v. *U.S.*, *supra*, at 211 F.2d 56,57.

II

The Secret, Discriminatory, Anticompetitive Rate-Fixing Contracts Between PWC's Big Six Japanese Carrier Members And The Japanese Cartel Trading Company Shippers Are Part And Parcel Of The Overall Monopolistic Rate-Fixing Combination In Restraint Of Trade Alleged In The Complaint, Which Is Fully Actionable Under, And Not Immune From, The Antitrust Laws.

As mentioned above, respondents finally concede in their brief in this Court that none of the secret, long-term, discriminatory rate-fixing contracts made in this case between PWC's Big Six Japanese carrier members and petitioners' competitors, the Japanese cartel wood chip shippers, are immune from the antitrust laws.[18]

These non-exempt contracts lie at the very heart of the monopolistic rate-fixing combination in restraint of trade in U.S. wastepaper exports alleged in the complaint (App. 32a-

[17] The D.C. Circuit expressly stated: ". . . *[W]e affirm the ALJ* and hold in favor of petitioners" (658 F.2d 829). Contrary to respondents' brief (p. 4), the D.C. Circuit did *not* leave "undisturbed the Commission's conclusion that PWC had not operated outside the scope of its antitrust immunity." On the contrary, it *expressly* approved the ALJ's contrary holding (658 F.2d 823), and reserved for decision in a case under the Sherman Act the extent of respondents' liability under the antitrust laws (658 F.2d 825, 826).

[18] Respondents' brief, pgs. 12, 13.

37a; 42a-47a). This was repeatedly recognized by both the ALJ and the D.C. Circuit in the Shipping Act case (App. 58-59a; 658 F.2d 819-20, 824, 827). That rate-fixing combination—consisting of the PWC monopoly, PWC's carrier members, and petitioners' competitors, the woodpulp-wood chip shippers—continuously discriminated against and injured U.S. wastepaper shippers by constantly subjecting them to rigid, monopolistic, discriminatory, "outrageously-high" PWC rate-fixing, while competing woodpulp shippers were favored by PWC with preferential, low "open rates," and the wood chip shippers, principally the Japanese trading company cartels, were granted far more preferential, discriminatory, long-term rate-fixing contracts negotiated with their economic partners, the Big Six Japanese carrier members of PWC (App. 36a; 44-45a; *Conf. Ex. 99*).

The Ninth Circuit patently misunderstood the allegations of the complaint in this case when it suggested that the extremely discriminatory, secret rate-fixing wood chip contracts between the Japanese carriers and the Japanese cartel shippers are the "product of free competition" (App. 8a). The allegations regarding "free and open competition among defendant carriers" in the complaint were intended exclusively to describe *the inherently discriminatory nature* of respondents' 3-tier rate-fixing system in this case (See App. 35a, 36a). Wastepaper rates, as aforesaid, are always rigidly fixed and enforced by the PWC monopoly, where all rate competition among carriers is absolutely foreclosed (App. 33a-35a). Concomitantly, the PWC monopoly has always granted "*open rates*" to woodpulp shippers, so those shippers could obtain lower rates through competition among PWC's carrier members; while PWC's most influential members, the Big Six Japanese carriers, operated outside PWC, and combined with Japanese cartel wood chip shippers, to grant them far, far lower preferential rates through the aforesaid wood chip contracts. The last mentioned rates, constantly at least 40% lower than the PWC monopoly rates for wastepaper shippers, were regularly set for 10 years, while the competing wastepaper shippers were always made to operate at the whim of the PWC monopoly.

In conclusion, the D.C. Circuit's recent decision in *Sea-Land Service, Inc.* v. *United States*, 683 F.2d 491 (1982), demonstrates why certiorari is imperative to correct the Ninth Circuit's erroneous holding that these Japanese contracts are the "product of free competition." In *Sea-Land*, many of the U.S. flag respondents in this case presented sworn evidence to show why they, as well as U.S. shippers, are imperiled by the almost complete lack of free competition among the Big Six Japanese carrier members of PWC. The U.S. flag carriers testified that the Big Six Japanese lines actually operate as "a joint service"; that they "engage in bloc voting in . . . conferences"; and thus they have *"achieved functional control of the trans-Pacific conferences"* (683 F.2d 496-500). In addition, those U.S. flag respondents demonstrated that the Japanese government actually formulates all important agreements for the Japanese carriers, and that *"because of their close relationships with the Japanese trading houses, [the Japanese carriers] have a lock on a significant portion of* the cargo which moves" (683 F.2d 498-500).

Here, the Japanese lines have combined through the PWC monopoly to "lock out" U.S. wastepaper shippers from Far East markets, while they combined with their Japanese trading house partners to "lock them in." This rate-fixing combination in restraint of trade is not "free competition," as the Ninth Circuit ruled. Rather, it is totally repugnant to the antitrust laws under the decisions of this Court and other courts cited by petitioners in this case.

Respectfully submitted,

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Dated: March 1, 1984

APPENDIX TO REPLY BRIEF

Federal Register / Vol. 49, No. 30 / Monday, February 13, 1984
Notices

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Niagara Frontier Tariff Bureau, Inc., et al.; Proposed Final Judgment And Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b) through (h), that a Proposed Final Judgment, Stipulation and Competitive Impact Statement (CIS) have been filed with the United States District Court for the Western District of New York in *United States of America* v. *Niagara Frontier Tariff Bureau, Inc., et al.*, Civil Action No. 83-1313C. The Complaint in this case charges a violation of section 1 of the Sherman Act, 15 U.S.C. 1, and names as defendants the Niagara Frontier Tariff Bureau Inc. (NFTB), a motor carrier rate bureau, and five motor carrier corporations that are NFTB members: Bondy Cartage Limited; Dominion-Consolidated Truck Lines Limited; ICL International Carriers, Ltd.;Inter-City Truck Lines (Canada), Inc.; and TNT Canada Inc. The defendants are parties to the NFTB's collective ratemaking agreement which was approved by the Interstate Commerce Commission (ICC) and which authorizes them to set rates collectively with immunity from the antitrust laws provided that they adhere to the terms of the agreement and ICC regulations. The Complaint alleges that from at least as early as 1966 and continuing to at least 1981, the defendants and co-conspirators conspired to fix, raise and maintain prices and inhibit or eliminate competition for the transportation of freight by motor carrier between the United States and Ontario, Canada, without complying with the terms of the NFTB's collective ratemaking agreement and by otherwise engaging in conduct that either was not or could not be approved by the ICC. In furtherance of their unlawful conduct, the defendants were alleged to have (1) set rates and agreed on methods to inhibit competition through their participation in an unauthorized committee; (2) set rates without complying with the notice and record-keeping requirements of the NFTB agreement and ICC regulations; and (3) interfered with the

rights of other motor carrirs to make rates independent of the NFTB agreed-upon rates.

The proposed Final Judgment would require the defendants to conduct their collective ratemaking activites in strict compliance with the NFTB agreement and ICC and statutory procedures. Further, the Judgment would prohibit the defendants from entering agreements to limit competition, other than authorized agreements to approve or disapprove a particular rate proposal.

The proposed Final Judgment would also limit the collective ratemaking activities of the defendant motor carriers and the NFTB to ensure that they do not interfere with a motor carrier's statutorily-guaranteed right to price independently. In this regard, the Judgment would (1) prohibit the motor carrier defendants from discussing with any other carrier or the NFTB any independent rate prior to the rate's publication; (2) prohibit the defendants from discussing an independent rate for 90 days after the issued date, except that it would permit discussions after the issued date concerning lowering the corresponding NFTB rate to an amount not lower than the independent rate; any such discussion could take place only in an authorized rate committee or subcommittee meeting; (3) prohibit the NFTB for 90 days after the issued date of an independent rate from processing rate proposals that could cause collective undercutting of the independent rate; and (4) require the defendant motor carriers to certify that their rate proposals for collective action were not aimed at forcing any other carrier to raise its rates. Greater detail is provided in the proposed Final Judgment and CIS, copies of which appear below.

Public comment is invited within the statutory 60-day comment period. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to Elliott M. Seiden, Chief,

Transportation Section, Antitrust Division, Department of Justice, Washington, D.C. 20530 (telephone: (202) 724-6349).

Joseph H. Widmar,
Director of Operations, Antitrust Division.

United States District Court for the Western District of New York

United States of America, plaintiff, v. Niagara Frontier Tariff Bureau, Inc., defendants; Civil Action No. 83-1313C; Judge Curtin.

Filed: January 19, 1984.